104

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Supreme Court, U.S.
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No. 08-160

IN THE

Supreme Court of the United States

KARIN JACOBS, PATRIA JACOBS and JOEANN FROST,
Petitioners,

v.

WILLIAM K. TAPSCOTT, JR. and BARON & BUDD, P.C.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

JEFFREY S. LYNCH *
THE LYNCH LAW FIRM
13740 Midway Road
Suite 702
Dallas, Texas 75244
(972) 991-0000

* Counsel of Record

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

Whether the District Court's application of the rule of improper fracturing of claims denied Petitioners due process of law?

Whether the submission of the entire case to the jury had the effect of withdrawing the ruling on the interlocutory summary judgment and, in essence, conceded that there was an issue of fact as to the Petitioners' causes of action, since the facts as to both causes of action were identical?

Whether the setting aside of the jury verdict, after a submission that unlawfully increased the burden of proof on the Petitioners is a violation of the public policy of the State of Texas that if there should be evidence to support the verdict, it is an abuse of discretion to set it aside.

PARTIES TO THE PROCEEDINGS

Petitioners, Karin Jacobs, Patria Jacobs and JoeAnn Frost, were the plaintiffs-appellants below.

Respondents, William K. Tapscott, Jr. and Baron & Budd, P.C. were the defendants-appellees below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
DECISIONS BELOW	1
JURISDICTION	1
CONSTIUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	15
I. THE DECISION BELOW GRANTING THE RESPONDENTS MOTION FOR PARTIAL SUMMARY JUDGMENT IN THE PRESENCE OF GENUINE ISSUES OF MATERIAL FACT VIOLATES PETITIONERS' RIGHTS TO DUE PROCESS AND THEIR RIGHT TO A JURY TRIAL	15
II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN THAT THE ADMISSION OF UNCONTROVERTED TESTIMONY AT TRIAL, COMBINED WITH THE SUBMISSION OF THE ENTIRE CASE TO THE JURY, HAD THE EFFECT OF WITHDRAWING THE RULING ON THE INTERLOCUTORY SUMMARY JUDGMENT. IN ESSENCE, THE RULING CONCEDED THAT THERE HAD IN FACT BEEN A GENUINE ISSUE OF MATERIAL FACT AS TO BOTH OF PETITIONERS' CAUSES OF ACTION, BECAUSE THE FACTS UNDERLYING THE CAUSES OF ACTION ARE IDENTICAL	21

TABLE OF CONTENTS—Continued

Page

III. THE DISTRICT COURT ERRED IN THE SETTING ASIDE OF THE JURY VERDICT, AFTER A JURY SUBMISSION THAT UNLAWFULLY INCREASED THE BURDEN OF PROOF ON THE PETITIONERS IN VIOLATION OF THE PUBLIC POLICY OF THE STATE OF TEXAS, SPECIFICALLY, THAT THERE WAS MORE THAN A MERE SCINTILLA OF EVIDENCE TO SUPPORT THE VERDICT. IN SUCH A CASE, IT IS AN ABUSE OF DISCRETION AND A DENIAL OF A FAIR TRIAL FOR THE DISTRICT COURT TO SET ASIDE THE VERDICT 24

CONCLUSION 31

APPENDICES 1a

TABLE OF AUTHORITIES

CASES	Page
Am. Home Assurance Co. v. United Space Alliance, LLC, 378 F.3d 482 (5th Cir. 2004)	25
Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935)	15
Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969)	30
Brown v. Bryan County, Okla., 219 F.3d 450 (5th Cir. 2000)	25
Burrow v. Arce, 997 S.W.2d 229, 42 Tex. Sup. Ct. J. 932 (Tex. 1999)	24
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	21
Crowe v. Henry, 115 F.3d 294 (5th Cir. 1997)	15
Deutsch v. Hoover, Bax & Slovacek, L.L.P., 97 S.W. 3d 179 (Tex. App. - Houston [14th Dist.] 2002, no pet.)	2, 18
Dimick v. Schiedt, 293 U.S. 474, 476 485-86 (1935)	15
Edwards v. Elliott, 88 U.S. (21 Wall) 532, 557 (1874)	13, 14
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)	2
Evans v. Ford Motor Company, 484 F.3d 329 (5th Cir. 2007)	25
Fulbright & Jaworski, L.L.P. v. Mariner Health Care, Inc., 2006 U.S. Dist. LEXIS 86229 (W.D. Tex. May 22, 2006)	24
Gasoline Products Co. v. Champlin Ref. Co., 283 U.S. 494, 497 – 99 (1931)	15
Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997) (en banc)	30

TABLE OF AUTHORITIES—Continued

Page

Greathouse v. McConnell, 982 S.W.2d 165, 172 (Tex. App. – Houston [1st Dist.] 1998, pet. denied) 16
IHS Cedars Treatment Ctr. v. Mason, 143 S.W.3d 794, 798 (Tex. 2004) 16
Kahlig v Boyd, 980 S.W.2d 685, 688 (Tex. App. - San Antonio 1998, pet. denied) 2
Liberty Mut. Ins. Co. v. Falgoust, 386 F.2d 248 (5th Cir. 1967) 25
Lubke v. City of Arlington, 455 F.3d 489 (5th Cir. 2006) 25
Pearson v. Yewdall, 95 U.S. 294, 296 (1877) 13, 14
St. Louis & K.C. Land Co. v. Kansas City, 241 U.S. 419 (1916) 13, 14
The Justices v. Murray, 76 U.S. (9 Wall.) 274, 277 (1870) 13, 14
Walker v. New Mexico & So. Pac. R.R., 165 U.S. 593, 596 (1897) 15
Walker v. Sauvient, 92 U.S. 90 (1876) 13, 14
Wardlaw v. Inland Container Corp., 76 F.3d 1372 (5th Cir. 1996) 26
Williams v. Briscoe, 137 S.W.3d 120, 124 (Tex. App. – Houston [1st Dist.]2004, no writ) 16

CONSTITUTIONAL PROVISIONS

FIFTH AMENDMENT ..... *passim*
SEVENTH AMENDMENT ..... *passim*

STATUTES AND RULES

28 U.S.C §1254(1) 1
FED. R. CIV. P. 56(e) 22
TEXAS RULES OF DISCIPLINARY PROCEDURE ..... *passim*
TEX. GOV'T CODE ANN. TIT. 2, SUBTIT. 4G 5

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reprinted in the Appendix (App.) S at 190a-193a. The decision of the United States District Court for the Northern District of Texas, Dallas Division is reported at 516 F. Supp. 639 (N.D. Tex. 2007) and is reprinted in the Appendix (App.) G at 87a-115a.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2008. This court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTIUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

The Seventh Amendment provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and **no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.**" (Emphasis added)

STATEMENT OF THE CASE

This petition seeks review of the decision of the District Court and affirmed by the Fifth Circuit overturning a jury verdict in favor of the Petitioners.

This petition also seeks review of application of the improper fracturing of claims by the District Court and the Fifth Circuit that resulted in a denial of Petitioners' rights to due process under the Fifth and Seventh Amendments to the Constitution.

This case is governed by *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938) which directs the Court to the application and interpretation of state law. The applicable law in this matter is the law of the State of Texas. The law of the State of Texas recognizes both a cause of action for negligence (legal malpractice) and for breach of fiduciary duty in claims against attorneys, as well as against other individuals and entities who are or have been in a fiduciary relationship. *Kahlig v Boyd,* 980 S.W.2d 685, 688 (Tex. App. – San Antonio 1998, pet. denied); *Deutsch v. Hoover, Bax & Slovacek, L.L.P.,*

97 S.W. 3d 179 (Tex. App. – Houston [14th Dist.] 2002, no pet.). The primary distinction between the two causes of action is that a breach of fiduciary duty does not require a showing of actual damages.

Petitioners filed suit against the Respondents on multiple claim theories including negligence (malpractice), breach of fiduciary duty and breach of contract. *See* App. C, 43a-74a. In spite of the Petitioners' rights to maintain both claims of negligence and breach of fiduciary duty in a civil action in Texas, the District Court stripped the Petitioners' rights to maintain both claims in this case. The court dismissed all but two of Petitioners' claims in an order granting Respondents a partial summary judgment. *See* App. C, 43a-74a. The two remaining breach of fiduciary duty claims were decided by the jury.

After a four (4) day jury trial the jury returned a verdict in favor of the Petitioners finding that Respondent William K. Tapscott, Jr. ("Tapscott") deliberately lied about the settlement of the claims against Pittsburgh Corning Corporation ("PCC"). The jury awarded the Petitioners $129,000.00 in actual damages. *See* App. D, 75a, 82a, and 86a. The jury returned a verdict against the Petitioners on their claim that the Respondents improperly used and exercised their powers of attorney. *See,* Id.

The District Court in its Jury Charge required the Petitioners to prove that Tapscott deliberately lied to them about the settlement with PCC. *See* App. D, 75a and 82a. There is no requirement under the law of Texas that the breach of fiduciary duty be "deliberate" as required by the charge of the District Court herein, which would constitute error by the District Court. In fact in the context of a breach of

fiduciary it is only necessary to show that a duty owed was breached.

The verdict of the jury reflects that there were in reality fact issues that, having been submitted to the jury, effectively reversed the interlocutory summary judgments in favor of Respondents. The action of the District Court in setting aside the jury's findings of fact in order to conform the judgment to the improperly granted summary judgments became cumulative error at the District Court level, and the upholding of that ruling by the appellate court is, likewise, error that effectively denies the Petitioners their rights under the Seventh Amendment.

The District Court conducted a hearing on the Respondents' Motion for Judgment on March 30, 2007. On April 12, 2007 the District Court granted Respondents' Motion for Judgment and entered a judgment in favor of the Respondents, taking away the jury's verdict that established the Respondents had deliberately lied about the PCC settlement and thereby denied Petitioners their due process rights under the Fifth and Seventh Amendments. *See* App. E, 87a-115a; App. F, 116a-117a. The Petitioners appealed the District Court's judgment on May 11, 2007. *See* App. B, 41a-42a.

The underlying facts of the case are quite simple and for all practical purposes undisputed. Karin Jacobs, Patria Jacobs and JoeAnn Frost (collectively "Petitioners"), sued Respondents Tapscott, an attorney, and his employer, Baron & Budd, P.C. ("B&B") (collectively "Respondents"), based on their representation of Petitioners in asbestos-related litigation arising from the death of Carl Bernard Jacobs ("Carl Jacobs") from mesothelioma. *See* App. G, 118a-120a. Karin Jacobs is Carl Jacob's widow, and Patria

Jacobs and JoeAnn Frost are his daughters. B & B, a firm with a national reputation for handling asbestos litigation, accepted Petitioners' case under a contingent fee arrangement. *See* App. G, 119a. Each Petitioner signed an employment agreement and a power of attorney. *See* App. H, 121a-123a, App. I, 124a-126a, and App. J, 127a-129a. B&B filed suit on behalf of Petitioners and Carl Jacob's estate in state district court in Galveston County, Texas (the "Jacobs Litigation") against numerous underlying defendants in the state Court case (collectively "defendants" and singularly "defendant").

Tapscott and Christina Mancuso ("Mancuso") were at all material times employees of B&B. The Respondents at all relevant times were attorneys licensed to practice law in the state of Texas. Mancuso was also an attorney licensed to practice law in the state of Texas. The relationship between the Petitioners and Respondents was memorialized in three (3) separate employment agreements and the Petitioners relationship with the Respondents was as a matter of law a fiduciary relationship. *See* Id. The duties, obligations and responsibilities of attorneys to their clients in the state of Texas are set forth and defined by the Texas common law and the Texas Rules of Disciplinary Procedure of Professional Conduct, Tex. Gov't. Code, Ann. Tit. 2, Subtit. 4 G (Vernon 1995). Under Texas laws, clients are entitled to prompt disclosures on the part of their attorneys of all facts that might affect their case. The duty arises in part from the clear disparity of knowledge between the attorney and the client concerning the factual details of the case and the law applicable to the facts. The duty to make full and complete disclosures to clients is a fact and a correct

statement of law that few Texas attorneys would even consider challenging.

Respondent Tapscott was the case manager for suits pending in Galveston County, Texas, and therefore was the case manager for the Jacobs Litigation. *See* App. E, 96a. As the case manager, Tapscott was responsible for the case and for communicating with the Petitioners. Another attorney, Rick Nemeroff ("Nemeroff"), was the B&B lawyer who would have represented Petitioners had the case been tried. *See* Id. B&B sued numerous defendants on Petitioners' behalf, including PCC. *See* App. Id. Mancuso was the B&B attorney who had responsibility for negotiating settlements with PCC. *See* App. E, 96a-97a.

Before the June 1, 1999 trial setting of the Jacobs Litigation, B&B attorneys negotiated settlements with several defendants. *See* App. E, 101a. June 1, 1999, Mancuso spoke by telephone with Cathy Mohan ("Mohan"), an attorney who represented PCC, and settled Plaintiff's case for $225,000. *See* App. E, 97a-98a. Mancuso did not maintain any records of the negotiations, dates of negotiations or settlement offers or settlement demands, and admitted that she had destroyed those documents. *See* Trial Testimony 2:101 (2:101) Mancuso then proceeded to relay the settlement information to Tapscott. *See* App. E, 98a. Mancuso was, according to her trial testimony, "absolutely sure" that she told Tapscott that PCC had not settled on June 2, 1999. *See* App. E, 99a. Tapscott deferred from testifying that Mancuso's testimony was not accurate. *See* Id. Tapscott had no records to review regarding this telephone conversation with Mancuso. *See* Id. The effect of the decision in this case is to preclude Petitioners, who

did nothing wrong, their day in court and their right to recover.

On the morning of June 2, 1999, Mohan called Mancuso to tell her that PCC was pulling its settlement offer because the case had not been resolved as to all defendants. *See* Id. As soon as Mancuso learned this information, she immediately relayed it to Tapscott by telephone that PCC had pulled its settlement offer. *See* Id. Since PCC pulled its offer to settle, the case was not settled as to all defendants as the Respondents had informed the Petitioners.

On June 2, 1999, Tapscott advised Karin Jacobs and Patria Jacobs that settlements had been reached with **all** the defendants for $2.5 million, and perhaps more, and that **the entire case had settled**. *See* App. E, 101a. (Emphasis added) No one at B&B, including Tapscott, ever told the Petitioners that the sum of $225,000 to be paid by PCC was not agreed to and would not be paid before the end of 1999. *See* App. E, 100a. For that matter, none of the Respondents informed the Petitioners at or about the time of the settlement of the entire case in June 1999 that some or all of the settlements would be in any form other than cash or that some of the settling entities were in bankruptcy.

Timing is vital, especially in this type of case, because it related to PCC and other financially troubled parties and entities, particularly since Petitioners did not get their money and the settlement was not finalized. *See* 3:124. In order to settle with PCC a plaintiff had to have a trial setting, and the case had to be called to trial. *See* 2:78 and 2:83. Because Tapscott and B&B did not adequately communicate amongst themselves, with the Court

and with Petitioners, Respondents did not conclude the settlement with PCC at $225,000.00. The case should have been concluded with PCC because the Respondents could have and should have informed the Court that the case was not settled as to PCC during the time that its attorneys were still in Galveston and should have requested the case be retained on the docket for purposes of trial or settlement. *See* 3:226 and 228.

It was well known to the Respondents that PCC's practice was to pay their settlements one hundred (100) days after their receipt of signed releases. *See* 2:120. This practice was not known by the Petitioners and Respondents never informed them of PCC's practice. Settling the case at the June 1999 trial setting would have allowed the exchange of the releases and the payment of the $225,000.00 well before the date of the filing for bankruptcy by PCC in April 2000. *See* 2:193.

The testimony of the Petitioners as well as their expert witness supports the jury's verdict of actual damages in the amount of $129,000.00 because it is less than the amount of the settlement offer of $225,000.00 on June 1, 1999 and less than the settlement of $215,000.00 later negotiated in November 1999. *See* App. E, 101a and 3:123.

The deliberate lie of Tapscott was the proximate cause of the actual damages sustained by the Plaintiffs and determined by the jury to be $129,000.00. *See* App. D, 84a.

On August 2, 1999, the Jacobs Litigation was reset for trial in November 1999. *See* App. E, 101a. Based on this trial date, Mancuso and Mohan negotiated a new settlement for $215,000. *See* Id. An agreed judgment was filed in January 2000, which required

that PCC make the payment by August 2000. *See* App. E, 102a. However, PCC filed for bankruptcy in April 2000, and therefore, Petitioners did not recover the entire negotiated amount. *See* Id. Petitioners did not recover the full amount of the Rapid American Corporation ("Rapid"), Fibreboard Corporation ("Fibreboard") or the Johns-Manville ("JM") settlement. *See* App. K, 140a.

Petitioners became dissatisfied with B&B's representation because of lack of communication and because the information conveyed to them concerning settlements, the settlement of the entire case, including the claims against PCC were statements that were known by Respondents to be entirely false. Petitioners alleged that the settlement was not for an amount they had agreed to accept when they retained B&B or during the representation by B&B, *see* App. K, 140a, and that their case was worth substantially more than what they received in settlement; they were not informed of important details of the settlements, including that some of the settlements would not be paid entirely in cash, a settlement had not been reached with PCC, that certain defendants were in poor financial condition or bankrupt, and only a fraction of the sum that one defendant had agreed to pay was payable immediately in cash, with virtually no possibility of recovering the balance; that Respondents did not obtain from the defendants written confirmation or evidence of the settlements and did not protect Petitioners from the consequences of post-settlement bankruptcies; and that Respondents had renegotiated the settlement with one defendant, substantially reducing the payment. Petitioners sued Tapscott and B&B on theories of negligence, misrepresentation, breach of fiduciary duty, breach of contract, fee forfeiture, and gross

negligence because the Respondents handled and treated Petitioners as though they were unwelcome and unnecessary participants in their own lawsuit. Respondents entirely usurped their involvement with settlement and litigation matters. The legal obligations owed by the Respondents to the Petitioners do not change because of the nature of the suit, and they are certainly not diminished because the Petitioners' claims were toxic tort claims.

Petitioners individually and collectively had no role or involvement in the failure of the case to settle for the amounts Respondents had informed them were the amounts of the settlement of the entire case.

It is undisputed that on June 2, 1999 Mancuso knew that PCC had withdrawn any settlement offer to the Petitioners and was no longer willing to settle the case. On the same day Mancuso told Tapscott that PCC would not settle with the Petitioners.

It is undisputed that Tapscott never informed the Petitioners that PCC had withdrawn its settlement offer. Tapscott never informed the Petitioners that PCC had not settled. Petitioners' case was set for trial on June 1, 1999 in the Galveston County District Court. A motion for continuance filed by one of the Defendants was denied. Tapscott in his testimony was uncertain whether he was in Galveston, Texas for the trial and was uncertain as to the date he informed the Petitioners that the entire case had settled. The Petitioner, Karin Jacobs, was uncertain of the date she received a phone call from Tapscott concerning the case and the settlement of the entire case. Tapscott did communicate directly with Petitioners, Patria Jacobs by telephone concerning the case and the settlement of the entire case. Tapscott did not communicate by telephone with JoeAnn Frost

until June 8, 1999. There were no letters written by Tapscott or B&B to the Petitioners confirming the settlement of the entire case prior to June 14, 1999. On June 14, 1999 Petitioner, JoeAnn Frost, wrote to Tapscott confirming the settlement of the entire case. *See* App. P, 163a-164a. Tapscott's response back made no mention that the entire case had not settled. *See* App. P, 164a. Internal computer records kept and maintained by B&B continued to show that the entire case, including PCC had settled, as did periodic reports, despite the fact that at all material times B&B knew that PCC had not settled with the Petitioners. *See* App. E, 108a-109a.

There was no issue of fact therefore, in the evidence that a breach of fiduciary duty by Respondents had not occurred because Respondents never informed the Petitioners of the true status of the settlement of the entire case and in particular with PCC. The powers of attorney granted by Petitioner to B&B as a matter of law do not relieve the Respondents of the fiduciary duties they owed to the Petitioners. The Texas Rules of Disciplinary Procedure of Professional Conduct have no requirement that the action of an attorney be either intentional or deliberate. Similarly, Texas case law does not impose a requirement or require an element of an intentional or deliberate act by the attorney. The only instance in which a lack of intentional or deliberate conduct becomes relevant is the evaluation of the amount of the disgorgement of attorney's fee that should be ordered.

The District Court in its order granting a partial summary judgment in favor of the Respondents reasoned in part that the Petitioners had not demonstrated a cause of action for negligence because there was no showing of actual damages, that all but

two of Petitioners' breach of fiduciary claims were improperly fractured negligence claims and claims for breach of contract were also improperly fractured as well. As reflected in the jury verdict Petitioners factually established a *prima facie* case for negligence including evidence from their expert witness that their damages were equal to the amount the Respondents had informed them that they would receive less the amount they actually received or $261,228.03.

Thus the status of the record was that there is more than a scintilla of evidence that a breach of fiduciary duty owed by the Respondents to Petitioners did in fact occur. The District Court erred in granting Respondents a partial summary judgment for two reasons:

1. There was clear evidence, more than a scintilla, that Respondents' breached their fiduciary duty to the Petitioners as set forth in the Petitioners' response; and

2. To the extent Texas law attempts to limit the plaintiff against an attorney to only a cause of action for malpractice, and even though the Rules of Disciplinary Procedure of Professional Conduct do not form the basis of a cause of action, these rules are admissible as to the standard of care for legal practice, which is why the District Court let that evidence into the trial. Granting a summary judgment that deprived the Petitioners of going to court on the issue of malpractice which order was improper and denied the Petitioners their rights under the Fifth and Seventh Amendments.

The District Court imposed an unreasonably onerous and incorrect burden of proof on the Petitioners

as to their claim that Respondent Tapscott deliberately lied to them about the settlement with PCC at trial and in the Jury Instructions. The standard of case in Texas is the Rules of Disciplinary Procedure of Professional Conduct, and the District Court engrafted the heavier burden on the Petitioners' *sua sponte* without any authority in Texas law. The effect of the increased burden of proof on the Petitioners was to subject the Respondents to a lesser standard of professional conduct, in derogation of state law, which is not permitted under the *Erie* doctrine in the absence of a Constitutional issue. Despite the increased burden of proof, the Petitioners met the burden of proof and established to the satisfaction of the jury sufficient legal proof of Respondents' breach of fiduciary duty.

The jury verdict in favor of the Petitioners was overturned by the District Court after submission of the case to the jury. The District Court's decisions to overturn the jury's verdict effectively resulted in a denial of Petitioners' rights to due process of law in violation of both Fifth Amendment and the Petitioners' right to a jury trial in violation of the Seventh Amendment[1] to the United States Constitution ("Constitution"). The Petitioners were entitled to trial by jury and to the jury's findings in their favor upheld and not set aside because there was more than a scintilla of evidence to support the jury's verdict. Where there is more than a scintilla of evidence to support the jury's verdict, the law prohibits such an

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[1] *Pearson v. Yewdall*, 95 U.S. 294, 296 (1877); *Edwards v. Elliott*, 88 U.S. (21 Wall) 532, 557 (1874); *The Justices v. Murray*, 76 U.S. (9 Wall.) 274, 277 (1870); *Walker v. Sauvient*, 92 U.S. 90 (1876); *St. Louis & K.C. Land Co. v. Kansas City*, 241 U.S. 419 (1916).

action by the District Court or by the appellate court. Despite the District Court's prior ruling on the Respondents' motion for summary judgment on Petitioners' claims of negligence, breach of contract and punitive damages, the submission of the breach of fiduciary duty claims by the District Court to the jury on the same core of facts, demonstrates that the order granting a partial summary judgment was improper because there were in fact genuine issues of material facts. The law is clear that if there is not a scintilla of evidence to support a jury's verdict then the verdict can be set aside. If there is a scintilla of evidence then the jury's verdict must stand and cannot be set aside. Because the jury reached a verdict in favor of the Petitioners based upon the factual evidence presented at trial, in spite of the improperly high burden imposed by the District Court in its jury charge on the Petitioners, there had to have been more than a mere scintilla to support the verdict. Setting aside the jury verdict was clearly improper.

It is well-settled that the jury trial guarantees contained in the Seventh Amendment applies to cases in federal court. *Pearson v. Yewdall*, 95 U.S. 294, 296 (1877); *Edwards v. Elliott*, 88 U.S. (21 Wall) 532, 557 (1874); *The Justices v. Murray*, 76 U.S. (9 Wall.) 274, 277 (1870); *Walker v. Sauvient*, 92 U.S. 90 (1876); *St. Louis & K.C. Land Co. v. Kansas City*, 241 U.S. 419 (1916). The Amendment contains within its own text the essence of the division of responsibility in the American system of justice as to the findings of facts. Indeed, it is of the very essence of what the Framers intended that the jury, and not the judge, be finders of fact. As noted in numerous cases before this Court: "the common law distinction between the province of the jury, whereby, in the absence of express or implied consent to the contrary, issues of

law are resolved by the court and issues of fact are to be determined by the jury under the appropriate instructions by the Court." See *Baltimore & Carolina Line v. Redman,* 295 U.S. 654, 657 (1935); *Walker v. New Mexico & So. Pac. R.R.,* 165 U.S. 593, 596 (1897); *Gasoline Products Co. v. Champlin Ref. Co.,* 283 U.S. 494, 497-99 (1931); *Dimick v. Schiedt,* 293 U.S. 474, 476 485-86 (1935). It is the failure of the District Court to give the proper instruction as to the burden of proof and then setting aside the jury's verdict that had been rendered in favor of the Petitioners that was a cumulative error that deprived the Petitioners of their rights under the Seventh Amendment.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW GRANTING THE RESPONDENTS MOTION FOR PARTIAL SUMMARY JUDGMENT IN THE PRESENCE OF GENUINE ISSUES OF MATERIAL FACT VIOLATES PETITIONERS' RIGHTS TO DUE PROCESS AND THEIR RIGHT TO A JURY TRIAL.

The District Court in its September 25, 2006 Memorandum Opinion and Order granted Respondents a partial summary judgment on the Petitioners' claims of negligence, breach of contract, all but two of the breach of fiduciary duty claims and punitive damages. *See* App. C.

A factual dispute is genuine where a reasonable jury could return verdict for the nonmoving party. *Crowe v. Henry*, 115 F.3d 294, 296 (5th Cir. 1997) (holding that a material fact is one that might affect the outcome of the case under the governing law).

In addition, and contrary to the District Court's conclusion that there was no evidence of how much money was owed to the Petitioners (by the defendants who did not fulfill their settlements to Petitioners) or the amount of damages suffered by the Petitioners as a result of the conduct of the Petitioners, the Petitioners did indeed offer summary judgment evidence of their actual damages in their affidavits and in the testimony of their expert witness. Specifically the summary judgment evidence was offered by one of Petitioners' expert witnesses, Peter Ferraro that Petitioners actual damages were $261,228.03.

Under Texas law, "[t]he elements of a negligence cause of action are the existence of a legal duty, a breach of that duty, and damages proximately caused by the breach." *IHS Cedars Treatment Ctr. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004).

There are similar requirements for a claim for legal malpractice. "To recover on a claim for legal malpractice, a plaintiff must prove that the attorney (1) owed the plaintiff a duty; (2) the attorney breached that duty; (3) the breach proximately caused plaintiff's injuries; and (4) the plaintiff was damaged." *Williams v. Briscoe*, 137 S.W.3d 120, 124 (Tex. App. – Houston [1st Dist.] 2004, no writ) (citing *Greathouse v. McConnell*, 982 S.W.2d 165, 172 (Tex. App. – Houston [1st Dist.] 1998, pet. Denied).

Moreover,

> [w]hen a legal malpractice claim arises from earlier litigation, the plaintiff also bears the burden to prove he would have prevailed on the underlying cause of action. In addition, a plaintiff must prove the amount of damages he

> would have recovered and collected in the underlying case if it had been properly prosecuted. Evidence that damages could have been collected is required because, even if an attorney's negligence prevented the entry of a judgment in the client's favor, the client suffered no damage unless he could have collected some part of that judgment. This aspect of plaintiff's burden is commonly referred to as the "suit within a suit" requirement. Thus, to prove the [defendant] committed legal malpractice, appellants had to prove that the medical negligence claim would have been successful, that it would have resulted in damages, and that those damages would have been collectible.

The affidavits of Karin Jacobs, *see* App. L, Patria Jacobs *see* App. M, and JoeAnn Frost, *see* App. N, along with the affidavit Petitioners' expert witnesses, Ferraro, *see* App. K, and the oral deposition testimony of Mark Hendrix ("Hendrix"), set forth the summary judgment evidence of Respondents' negligence and Petitioners' damages resulting therefrom.

If there were payment problems the Respondents had the duty to disclose and to inform the Petitioners. Where the Respondents have stated categorically and unequivocally to the Petitioners what the settlement outcome they negotiated will be, then it is only logical to hold them to responsibility that the result negotiated is the result they were legally required to achieve. The result that should have been achieved by Respondents alone clearly demonstrates what the outcome should have been for the Petitioners. The Petitioners had nothing to do with outcome being less than what the Respondents stated and informed them of what the outcome would

be from the settlement of the entire. The Petitioners should only be required to prove the outcome the Respondents stated would occur.

Further the law concerning the improper fracturing of claims is quite unclear, without any definitive formulation or test as to when a breach of fiduciary duty is a fractured negligence or a stand-alone non-fractured breach of fiduciary duty.

A party may raise both breach of fiduciary duty claims and malpractice claims in the same action. In *Deutsch v. Hoover, Bax & Slovacek*, L.L.P., 97 S.W.3d 179 (Tex. App. – Houston [14th Dist.] 2002, no pet. In *Deutsch*, the Court of Appeals held that the Plaintiff's allegations of the defendant's law firm's supposed "failure to disclose and counsel Deutsch about conflicts of interest, its failure to withdraw from representing Deutsch in light of these conflicts, and its failure to advise Deutsch to retain separate counsel because of these conflicts" all pleaded violations of the firm's fiduciary duties to him, and were not subsumed in his malpractice claims from the firms representation of him. *Id* at 190.

The law concerning whether claims asserted by a plaintiff in a negligence and malpractice against a lawyer are fractured or not is less than clear. There are no realistic guiding principles. The rationale appears to be the prevention of multiple claim theories when in fact only one claim exists. It cannot be applied fairly or reasonably without reference to the actual facts. Even identical facts can give rise to a claim of negligence and a breach of fiduciary duty. There is no statutory law in Texas that limits claims against attorneys to malpractice (negligence) only. If that were the case, then Petitioners would not have been able to pursue their two surviving breach of

fiduciary duty claims against the Respondents. Valid claims for breach of fiduciary duty should not be discarded or dismissed on a generic basis such "fractured claims" simply because it appears that one side is piling on the other. If that were to be the law then there would simply be no basis to pursue an attorney in a civil court for a breach of fiduciary duty.

Without adequate guidance a claimant remains at peril in attempting to decide whether the claim is only a malpractice claim or only a breach of fiduciary duty claim when filing suit. Should a claimant choose to file only a breach of fiduciary duty claim or a malpractice claim, the claim is at risk of an adverse determination if the trial court believes that the claim selection is incorrect.

The application of "fracturing claims" should not be applied automatically, particularly if the only litmus test used is the judge knowing improper fracturing when he or she sees it.

The entire concept of the improper fracturing of claims suggests that a case of malpractice/negligence cannot logically co-exist with a breach of fiduciary duty. This is simply untrue logically and legally.

Although the District Court did find that the improper use of Petitioners' powers of attorney and the deliberate lying did not constitute improper fracturing of a breach of fiduciary duty claim, it wrongly determined that Respondents misstatements and omissions alone concerning the status of the settlement were not. Such conduct violates an attorney's fiduciary duty to the client as specifically spelled out by the District Court's Jury Charge. *See* App. D.

Texas law and the District Court's jury verdict clearly and unequivocally define breach of fiduciary

duty claim. The Petitioners strongly dispute the notion and the finding that they did not properly assert breach of fiduciary duty claims against Respondents.

If an attorney owes the client a fiduciary duty of 'most abundant good faith,' absolute perfect candor, openness, and honesty, and the absence of any concealment or deception; then misstatements, omissions, the failure to correct information conveyed and known to be wrong, and concealment of the relevant facts concerning the settlements with Rapid, Fibreboard and JM also constitute a breach of fiduciary duty. These breaches are not and cannot be improperly fractured claims of malpractice/negligence because they arose and exist because of fiduciary obligations independent of whether or not the attorney failed to confirm or document the settlement.

The Court's holding that the Petitioners engaged in fracturing a malpractice claim in a multitude of other claims such as breach of fiduciary duty, breach of contract, misrepresentation, and fee forfeiture is completely incorrect legally under Texas law and factually. Petitioners are entitled under the facts and circumstances to a jury trial on all of their negligence and breach of fiduciary duty claims against the Respondents.

To permit Respondents' conduct in this matter and to uphold the District Court's granting of a partial summary judgment on negligence and all but two of Petitioners' breach of fiduciary duty claims unfairly burdens and punishes the Petitioners and it does not place the legal duties and obligations where they belong—on the attorneys, or Respondents, in this case.

If these evidentiary obstacles exist as to proving actual damages relating to statements, comments and obligations of the Petitioners, then all clients are at risk of suffering significant claims, losses, and legal remedies for their attorneys' conduct. Petitioners' rights to due process of law and a jury trial were indeed violated.

As a matter of law, Respondents failed to establish that they did not commit negligence and/or breach of their fiduciary duties, and as such the burden of proof does not shift to the non-moving party. *See Celotex v. Catrett*, 477 U.S. 317 at 323-25 (1986). Assuming all of the evidence favorable to Petitioners, the order granting a summary judgment on breach of fiduciary should not have been entered by the District Court.

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN THAT THE ADMISSION OF UNCONTROVERTED TESTIMONY AT TRIAL, COMBINED WITH THE SUBMISSION OF THE ENTIRE CASE TO THE JURY, HAD THE EFFECT OF WITHDRAWING THE RULING ON THE INTERLOCUTORY SUMMARY JUDGMENT. IN ESSENCE, THE RULING CONCEDED THAT THERE HAD IN FACT BEEN A GENUINE ISSUE OF MATERIAL FACT AS TO BOTH OF PETITIONERS' CAUSES OF ACTION, BECAUSE THE FACTS UNDERLYING THE CAUSES OF ACTION ARE IDENTICAL.

The testimony of all parties was uncontroverted that the Respondents never informed the Petitioners that PCC would not settle. Under prevailing Texas

law, these facts alone provide a basis for **two separate and distinct causes of action** against an attorney that may be pleaded, as in this case, in the alternative, i.e. negligence *and* breach of fiduciary duty. This makes the ruling of the court that the causes of action is improperly fractured" and granting the interlocutory summary judgment in favor of the Respondents erroneous because the District Court retained the second cause of action and allowed it to go to the jury.

In the face of testimony presented by the Respondents themselves, plus the expert testimony as to damages admitted without objection, the District Court erred by setting aside a jury verdict based upon factual and expert testimony that was not controverted. The verdict of the jury for all practical purposes negated that portion of the interlocutory summary judgment that would have found "no genuine issue as to any material fact."

Despite the heavier burden, the District Court submitted the case on the "deliberate" standard. By submitting the case to the jury, after overruling the motion for directed verdict, the District Court, in effect, withdrew its ruling on the interlocutory summary judgment, because the interlocutory summary judgment had been granted on the same facts that now went to the jury. Rule 56, Federal Rules of Civil Procedure, requires that for a summary judgment to be granted there can be no genuine issue as to a material fact *and* that the movants are entitled to judgment as a matter of law. The action of the District Court in allowing the two (2) breach of fiduciary duty claims to go to the case jury reflects that either there were fact issues that should have precluded the original granting of a partial summary

judgment, or an issue of law on the question of "deliberate" as an element of the Respondents' breach of fiduciary duty.

The jury returned an affirmative finding in favor of "deliberate", which sets the basis for arguing that the District Court erred in granting Respondents an interlocutory partial summary judgment. Even at the higher, arguably an arbitrary standard required by the District Court, the factual evidence presented to the jury supported the findings against the Respondents for breach of fiduciary duty. In other words, under Texas law, breach of fiduciary duty does not require "deliberate" act. *See* App. D, 81a. Nonetheless under the erroneous charge of the District Court that required a finding of "deliberate," the jury found sufficient factual evidence to support their verdict in favor of the Petitioners. The facts noted above constitute more than a mere scintilla, and the court cannot set aside a jury verdict unless there is less than a scintilla of evidence to support the verdict. Consequently, the requirement of a finding of "deliberate," constitutes a denial of Petitioners' rights to due process of law, and effectively denied the Petitioners their Seventh Amendment right to a trial by jury.

The arbitrary nature of the instruction requiring a finding of deliberate by the District Court and then ignoring the evidence and the jury's findings by granting Respondents' motion for judgment constitutes a denial of Petitioners' rights to due process of law, and effectively denied the Petitioners their Seventh Amendment right to a trial by jury.

III. THE DISTRICT COURT ERRED IN THE SETTING ASIDE OF THE JURY VERDICT, AFTER A JURY SUBMISSION THAT UNLAWFULLY INCREASED THE BURDEN OF PROOF ON THE PETITIONERS IN VIOLATION OF THE PUBLIC POLICY OF THE STATE OF TEXAS, SPECIFICALLY, THAT THERE WAS MORE THAN A MERE SCINTILLA OF EVIDENCE TO SUPPORT THE VERDICT. IN SUCH A CASE, IT IS AN ABUSE OF DISCRETION AND A DENIAL OF A FAIR TRIAL FOR THE DISTRICT COURT TO SET ASIDE THE VERDICT.

A jury composed of ten (10) jurors, found the Respondents intentionally lied to the Petitioners and therefore committed a breach of fiduciary duty. The "finder of fact typically determines if there has been a breach of fiduciary duty." *Fulbright & Jaworski, L.L.P. v. Mariner Health Care, Inc.*, 2006 U.S. Dist. LEXIS 86229, *43 (W.D. Tex. May 22, 2006). "Whether an attorney has a breached fiduciary duty is typically a question for the fact finder based on considerations such as 'whether or when the misconduct occurred, the attorney's mental state at the time, and the existence or extent of any harm to the client." *Id.* (citing *Burrow v. Arce*, 997 S.W.2d 229, 246, 42 Tex. Sup. Ct. J. 932 (Tex. 1999). The jury's decision was based on the totality of the evidence presented at trial, including the amount of harm the Respondents' misconduct caused the Petitioners. However, the District Court decided that it should be the finder of facts and took that power away from the jury by granting the Respondents a motion for judgment after the jury had rendered its verdict.

The "standard of review with respect to a jury verdict is especially deferential." *Lubke v. City of Arlington*, 455 F.3d 489, 494 (5th Cir. 2006) (quoting *Brown v. Bryan County, Okla.*, 219 F.3d 450, 456 (5th Cir. 2000)). "A jury verdict must stand unless there is lack of substantial evidence, in the light most favorable to the successful party, to support the verdict." *Am. Home Assurance Co. v. United Space Alliance, LLC*, 378 F.3d 482, 487 (5th Cir. 2004) (citing *Liberty Mut. Ins. Co. v. Falgoust*, 386 F.2d 248, 253 (5th Cir. 1967)). "The Court 'may not make credibility determinations or weigh the evidence.' Thus in reviewing the record as a whole, the court 'must disregard all evidence favorable to the moving party that the jury is not required to believe.' That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached. . ." *Evans v. Ford Motor Company*, 484 F.3d 329 (5th Cir. 2007). For reasons shown below, substantial facts do exist which support the jury's verdict and therefore that verdict should stand.

The United States Court of Appeals for the Fifth Circuit has noted:

> If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied . . .

Wardlaw v. Inland Container Corporation, 76 F.3d 1372, 1375 (5th Cir. 1996).

In accordance with the language above, it is apparent that substantial evidence did actually exist in the evidence heard by the jury "of such quality and weight that reasonable and fair-minded men [the jury] in the exercise of impartial judgment" reached a different conclusion than that of the motion.

In addition it is equally important that the District Court's Charge to the Jury posed the following question:

> "Did William K. Tapscott, Jr. deliberately lie to the plaintiffs and tell them the entire *Jacobs* Litigation had settled without telling them that Pittsburgh Corning Corporation had not settled?" *See App. D, 82a.*

The duty to truthfully communicate with Petitioners did not begin or end on a single day, or with a single telephone call, the evidence clearly established that Tapscott was informed that PCC withdrew its settlement offer on June 2, 1999 and that Tapscott never informed the Petitioners or the Court. Tapscott's fiduciary obligations to Petitioners have never ended. Tapscott's beliefs about the settlement of the Jacobs Litigation are simply not enough or sufficient when information is known to the contrary. It is inconceivable therefore that Tapscott did not communicate truthfully with Petitioners—he had obligation to know and a duty to inform the Petitioners that PCC had not settled.

The substantial evidence introduced into evidence and considered by the jury, that was not asked to

make a determination based on a date specific, is as follows:

1. The PCC settlement was not confirmed prior to Tapscott announcing to the Court that the entire case had been settled; *See* App. E, 99a.

2. The PCC settlement was not confirmed by Respondents prior to Tapscott advising the Petitioners that the entire case had been settled; *See* Id.

3. Tapscott testified that the settlements were real numbers—cash, not notes and did not involve bankrupt entities, when the statement amounts reported to the Petitioners included worthless notes and bankrupt entities; *See* 2:162-163;

4. The Appellees were informed by PCC on June 2, 1999 that there was no settlement;

5. Tapscott spoke to Karin Jacobs and Patria Jacobs to inform them that the entire case had been settled but did not inform them that PCC did not settle;

6. Tapscott wrote to JoeAnn Frost about the settlement of the entire case on or about June 14, 1999 and said nothing about PCC not settling or withdrawing its settlement; *See* App. P.

7. Respondents continued to maintain computer records indicating that PCC had settled when the Respondents knew the settlement had not taken place; *See* App. E, 108a-109a;

8. Respondents continued to inform Petitioners in writing that PCC had settled when the Appellees knew the settlement had not taken place; *See* Id.

9. Respondents never informed Petitioners that PCC did not settle as Appellees had stated had occurred in June 1999; 2:103;

10. Respondents position prior to trial that they were unaware PCC had not settled was false because at trial they said they did know that the settlement was withdrawn; *See* App. E, 99a;

11. Respondents were aware they provided incorrect and false information to the Appellants and to the Court that PCC had settled;

12. Mancuso unequivocally testified at trial that she, and hence the Appellees, knew on June 2, 1999 that PCC had not settled and that she was "absolutely sure" that she informed Tapscott by telephone; *See* App. E, 99a; and

13. Petitioners' expert witness, Hendrix, testified that Tapscott deliberately lied to Appellants about the settlement of the PCC claims and perpetuated the lie by not correcting his statement that the entire case had settled when he was informed by Mancuso that PCC had not settled. *See* 3:120.

This evidence was not offered as suggested by the Respondents at the Fifth Circuit of actions by Respondents occurring afterwards, but rather as corroborative evidence that proved or tended to prove

that Tapscott deliberately lied to Petitioners about the PCC settlement, whether it be by direct statement, omission, action or inaction. This is indeed substantial evidence that is more than sufficient to support the jury's verdict.

In the District Court's own Memorandum Opinion and Order filed April 12, 2007, it notes that Mancuso was made aware during the morning of June 2, 1999 that PCC was pulling its settlement offer because the case had not been resolved as to all defendants. *See* App. E, 99a. After further testimony, Mancuso revealed that as soon as she found this out, she relayed to Tapscott by telephone the fact that the offer had been pulled. *See* Id. The record then goes on to show that Tapscott called Karin Jacobs on June 2, 1999 and told her that B&B had won her lawsuit for $2.5 million and that the entire case had settled. *See* App. E, 100a. Tapscott also did not specifically say anything to Karin Jacobs about PCC's not agreeing to settle the case. *See* Id. In addition, the District Court assumed that June 2, 1999 is the date on which Tapscott also spoke to Patria Jacobs. *See* Id. Based on these facts, it appears very likely that reasonable and fair-minded men of the jury, exercising impartial judgment could have determined Tapscott found out from Mancuso on the morning of June 2, 1999 that PCC's settlement offer was no longer valid, and then, on that same date, he called Karin Jacobs and Patria Jacobs and deceptively told them the entire case had settled. Under these circumstances, where substantial evidence exists, the Fifth Circuit has stated that the motion should be denied.

Substantial evidence, more than a mere scintilla, for the jury to base its decision. The Fifth Circuit has

also determined that "it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969), overruled on other grounds, *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc). Therefore, in accordance with these prior determinations, the jury, composed of reasonable and fair-minded men, who heard and weighed the conflicting evidence and inferences to be drawn from the evidence and the demeanor of the witnesses utilizing their collective impartial judgment rendered a verdict that is entitled to deference and which should not have been disturbed and overruled by the Trial Court.

There is no requirement in Texas law that the breach of a fiduciary duty such as occurred in this case be deliberate. A lie is a lie, whether stated overtly or by omission, and an attorney, being held to a higher standard, is liable for the failure to abide strictly by this standard. The evidence in this case was such that it is uncontroverted that the Respondents did not inform the Petitioners of the refusal of PCC to settle, which was their duty as attorneys for the Petitioners. The engrafting of the requirement of "deliberate" on the actions of the Respondents unlawfully changed the law of the State of Texas. *See* App. D, 81a.

Further, the finding of the jury that the breach of the duty occurred despite the erroneous charge indicates that the evidence exceeded the normal legal requirements of Texas law, i.e. preponderance of the evidence, and, thus, constituted more than a mere scintilla to support the verdict. The setting aside of

the verdict, therefore, was erroneous both as to the public policy and as to Petitioners Seventh Amendment rights.

In conclusion, the actions of the District Court in setting aside the jury verdict in defiance of the well-established law of the State of Texas is a clear abuse of discretion which has the effect of denying the Petitioners their right to due process of law under the Fifth Amendment and their right to a jury trial under the Seventh Amendment.

CONCLUSION

For the reasons stated, the Court should grant the petition for certiorari.

Respectfully submitted,

JEFFREY S. LYNCH *
THE LYNCH LAW FIRM
13740 Midway Road
Suite 702
Dallas, Texas 75244
(972) 991-0000

* Counsel of Record

Attorneys for Petitioners

APPENDIX

APPENDIX A

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS (DALLAS)

CIVIL DOCKET FOR CASE #: 3:04-cv-01968

KARIN JACOBS, PATRIA JACOBS
AND JOEANN FROST,
Plaintiffs,

v.

WILLIAM K. TAPSCOTT, JR.
AND BARON & BUDD, P.C.,
Defendants.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
9/8/2004 (p. 23)	1	COMPLAINT against Baron & Budd PC, William K Tapscott (Filing fee $150; Receipt number 210982), filed by JoeAnn Frost, Karin Jacobs, Patria Jacobs. (klm,) (Entered: 9/9/2004)
9/8/2004		***Magistrate Judge Kaplan chosen by random selection to handle matters that may be referred in this case. (klm,) (Entered: 9/9/2004)
9/8/2004 (p. 44)	2	CERTIFICATE OF INTERESTED PERSONS by JoeAnn Frost, Karin Jacobs, Patria Jacobs. (klm,) (Entered: 9/9/2004)

DATE	NO.	PROCEEDINGS
9/8/2004 (p. 47)	3	DEMAND for Trial by Jury by JoeAnn Frost, Karin Jacobs, Patria Jacobs (klm,) (Entered: 9/9/2004)
9/8/2004	4	Summons Issued as to Baron & Budd PC, William K Tapscott (klm,) (Entered: 9/9/2004)
9/17/2004	5	SUMMONS Returned Executed as to William K Tapscott served personally on 9/16/2004, answer due 10/6/2004. (klm,) (Entered: 9/17/2004)
9/23/2004 (p. 49)	6	ORDER: No later than 20 days from the date of this order, pla must file an amended complaint that alleges diversity of citizenship in conformity with 28 USC Section 1332; otherwise, this action will be dismissed w/o prejudice for want of jurisdiction. (Signed by Judge Sidney A Fitzwater on Sept 23, 2004) (jyg,) (Entered: 9/24/2004)
10/5/2004 (p. 52)	7	Motion to Dismiss for Failure to State a Claim by Baron & Budd PC, William K Tapscott (klm,) (Entered: 10/6/2004)
10/5/2004 (p. 54)	8	Brief in Support re [7] Motion to Dismiss for Failure to State a Claim filed by Baron & Budd PC, William K Tapscott (klm,) (entered: 10/6/2004)

DATE	NO.	PROCEEDINGS
10/5/2004 (p. 57)	9	Motion to Strike by Baron & Budd PC, William K Tapscott (klm,) Entered: 10/6/2004)
10/5/2004 (p. 59)	10	Brief in Support re [9] Rule 12(f) Motion to Strike filed by Baron & Budd PC, William K Tapscott. (klm,) (Entered: 10/6/2004)
10/6/2004 (p. 63)	11	ORDER: Defendants filed an initial responsive pleading without a certificate of interested persons. No later than 20 days after this order is filed, defendants must comply with Rules 7.4 and 3.1(f) so that the court can ensure that recusal is not required in this case. (Signed by Judge Sidney A Fitzwater on 10/6/04) (klm,) (Entered: 10/7/2004)
10/6/200 (p. 65)	12	Order for Scheduling Order Proposal: Proposed Scheduling Order due by 11/5/2004. (Signed by Judge Sidney A Fitzwater on 10/6/04) (klm,) (Entered: 10/7/2004)
10/18/2004 (p. 68)	13	CERTIFICATE OF INTERESTED PERSONS by Baron & Budd PC, William K Tapscott. (klm,) (Entered: 10/18/2004)
10/20/2004 (p. 70)	14	FIRST AMENDED ORIGINAL COMPLAINT against Baron & Budd PC, William K Tapscott, filed by JoeAnn Frost, Karin Jacobs, Patria Jacobs (klm,) (Entered: 10/21/2004)

DATE	NO.	PROCEEDINGS
11/5/2004 (p. 91)	15	Joint Proposal for scheduling order by Baron & Budd PC, JoeAnn Frost, Karin Jacobs, Patria Jacobs, William K Tapscott (klm,) (Entered: 11/8/2004)
11/8/2004 (p. 95)	16	SCHEDULING ORDER: Amended Pleadings due by 10/1/2005 Discovery due by 11/1/2005. Joinder of Parties due by 4/1/2005. Motions due by 12/1/2005. (Signed by Judge Sidney A Fitzwater on 11/8/04) (klm,) (Entered: 11/9/2004)
11/8/2004 (p. 98)	17	Agreed MOTION to Enlarge Time to Respond to [7] Defendants' MOTION to Dismiss, and [9] MOTION to Strike by JoeAnn Frost, Karin Jacobs, Patria Jacobs (klm,) (Entered: 11/9/2004)
11/9/2004 (p. 102)	18	AGREED ORDER granting [17] Motion to Enlarge Time to Respond to Defendants' Motion to Dismiss and Motion to Strike. Responses due by 11/10/2004 (Signed by Judge Sidney A Fitzwater on 11/9/04) (klm,) (Entered: 11/10/2004)
11/10/2004 (p. 104)	19	RESPONSE to Defendants' Motion re [7] MOTION to Dismiss, and [9] MOTION to Strike and Brief in Support Thereof filed by JoeAnn Frost, Karin Jacobs, Patria Jacobs. (klm,) (Entered: 11/12/2004)

DATE	NO.	PROCEEDINGS
11/15/2004 (p. 115)	20	REPLY and Brief in Support to Plaintiffs' Response to Motion re [9] MOTION to Strike filed by Baron & Budd PC, William K Tapscott (klm,) (Entered: 11/16/2004)
11/15/2004 (p. 119)	21	REPLY and Brief in Support to Plaintiffs' Response to Motion re [7] MOTION to Dismiss for Failure to State a Claim filed by Baron & Budd PC, William K Tapscott. (klm,) (Entered: 11/16/2004)
12/17/2004 (p. 123)	22	ORDER denying defendants' [7] Motion to Dismiss, denying [9] Motion to Strike (Signed by Judge Sidney A. Fitzwater on 12/16/04) (klm,) (Entered: 12/1/2004)
12/22/2004 (p. 127)	23	ANSWER to Amended Complaint, THIRD PARTY COMPLAINT against Jeffery Lynch, COUNTERCLAIM against Karin Jacobs, Patria Jacobs, JoeAnn Frost by William K Tapscott, Baron & Budd PC (aat,) (Entered: 12/28/2004)
12/23/2004	24	Summons Issued as to Jeffery Lynch. (aat,) (Entered: 12/28/2004)
1/10/2005	25	THIRD PARTY SUMMONS Returned Executed as to Jeffery Lynch served personally on 1/4/2005, answer due 1/24/2005 (klm,) (Entered: 1/11/2005)

DATE	NO.	PROCEEDINGS
1/12/2005 (p. 140)	26	MOTION to Dismiss the Counter-claim of Defendants and Counter-Plaintiffs, and Brief in Support and Subject to the Motion to Dismiss, the Original Answer of JoeAnn Frost to the Counter-Claim Thereof by JoeAnn Frost(klm,) (Entered: 1/13/2005)
1/24/2005 (p. 150)	27	MOTION to Dismiss the Third-Party Complaint, and Brief in Support Thereof and Subject to the Motion to Dismiss, the Original Answer of Jeffrey Lynch to the Third-Party Complaint by Jeffery Lynch(klm,) (Entered: 1/25/2005)
1/25/2005 (p. 158)	28	CERTIFICATE OF INTERESTED PERSONS by Jeffery Lynch (klm,) (Entered: 1/27/2005)
2/1/2005 (p. 161)	29	RESPONSE to Motion re [26] Plaintiff's MOTION to Dismiss for Failure to State a Claim filed by William K Tapscott, Baron & Budd PC (klm,) (Entered: 2/3/2005)
2/14/2005 (p. 165)	30	RESPONSE to Motion re [27] MOTION to Dismiss Third Party Complaint filed by Karin Jacobs, Patria Jacobs, JoeAnn Frost. (klm,) (Entered: 2/15/2005)
4/4/2005 (p. 169)	31	ORDER denying [26] Frost's Motion to Dismiss, denying [27] Lynch's Motion to Dismiss (Signed by Judge Sidney A Fitzwater on 4/4/05) (klm,) (Entered: 4/4/2005)

DATE	NO.	PROCEEDINGS
5/31/2005 (p. 171)	32	Agreed MOTION to Extend Deadlines to Designate Expert Witnesses by Karin Jacobs, Patria Jacobs, JoeAnn Frost, Jeffery Lynch, William K Tapscott, Baron & Budd PC (klm,) (Entered: 6/1/2005)
6/1/2005 (p. 177)	33	ORDER granting [32] Agreed Motion to Extend the Deadlines to Designate Expert Witnesses. 7/15/05 Designation of expert witnessess; and 9/19/05 Designation of rebuttal expert witnesses. (Signed by Judge Sidney A Fitzwater on 6/1/05) (klm,) (Entered: 6/1/2005)
7/15/2005 (p. 180)	34	Agreed MOTION to Extend Deadlines to Designate Expert Witnesses by Karin Jacobs, Patria Jacobs, JoeAnn Frost, Jeffery Lynch, William K Tapscott, Baron & Budd PC (klm,) (Entered: 7/18/2005)
7/18/2005 (p. 185)	35	AGREED ORDER granting [34] Motion to Extend Time Deadlines to Designate Expert Witnesses. Designation of Expert Witnesses—7/25/2005. Designation of rebuttal expert witnesses—9/26/05. (Signed by Judge Sidney A Fitzwater on 7/18/05) (klm,) (Entered: 7/19/2005)

DATE	NO.	PROCEEDINGS
7/25/2005 (p. 188)	36	Agreed MOTION to Extend Time to Extend Deadlines to Designate Expert Witnesses by Karin Jacobs, Patria Jacobs, JoeAnn Frost, William K Tapscott, Baron & Budd PC (klm,) (Entered: 7/26/2005)
7/26/2005 (p. 194)	37	ORDER granting [36] Agreed Motion to Extend Deadlines to Designate Expert Witnesses. Designation of expert witnesses due by 7/28/2005; designation of rebuttal expert witnesses due by 9/29/05 (Signed by Judge Sidney A Fitzwater on 7/26/05) (klm,) (Entered: 7/27/2005)
8/26/2005 (p. 197)	38	TRIAL SETTING ORDER: Docket Call set for 4/17/2006 before Judge Sidney A Fitzwater. (Signed by Judge Sidney A Fitzwater on 8/26/05) (klm,) (Entered: 8/29/2005)
9/29/2005 (p. 202)	39	Designation of Expert Witnesses by William K Tapscott, Baron & Budd PC (klm,) (Entered: 9/29/2005)
9/29/2005 (p. 205)	40	Joint MOTION for Extension of Deadlines by Karin Jacobs, Patria Jacobs, JoeAnn Frost, Jeffery Lynch, William K Tapscott, Baron & Budd PC (klm,) (Entered: 9/29/2005)

DATE	NO.	PROCEEDINGS
9/30/2005 (p. 209)	41	ORDER granting [40] parties' Joint Motion to Extension of Deadlines. Motions due by 3/17/2006. The court has today signed an order granting the parties' joint motion for extension of deadlines. As the parties recognize in their motion, the order permits summary judgment and other motions to be filed as late as March 17, 2006. The parties must promptly submit a pleading that evidences compliance with Rule 40.1, i.e., a moving party and the party's attorney of record must sign and file a motion to continue the trial setting. In resetting the case, the court will consider a proposed date or time frame included in the pleading (Signed by Judge Sidney A. Fitzwater on 9/30/05) (klm,) (Entered: 9/30/2005)
9/30/2005 (p. 211)	42	ORDER GRANTING JOINT MOTION FOR EXTENSION OF DEADLINE: (see order for specifics) (Signed by Judge Sidney A Fitzwater on 9/30/05) (klm,) (Entered: 9/30/2005)
9/30/2005 (p. 213)		Set/Reset Scheduling Order Deadlines: Amended Pleadings due by 3/17/2006. Discovery due by 3/17/2006. Motions due by 3/17/2006, (klm,) (Entered: 9/30/2005)

DATE	NO.	PROCEEDINGS
10/12/2005 (p. 213)	43	Joint MOTION for Modification of Deadlines by Karin Jacobs, Patria Jacobs, JoeAnn Frost, Jeffery Lynch, William K Tapscoff, Baron & Budd PC (klm,) (Entered: 10/12/2005)
10/13/2005 (p. 217)	44	ORDER granting [43] joint Motion for Modification of Deadlines: Amended of Pleadings, plaintiffs 2/8/06, defendants 2/15/06; Completion of Discovery 2/1/06; Summary Judgment Motions and Motions not otherwise covered 2/15/06. (Signed by Judge Sidney A Fitzwater on 10/13/05) (klm,) (Entered: 10/14/2005)
10/13/2005		Set/Reset Deadlines: Amended Pleadings due by 2/8/2006. Discovery due by 2/1/2006. Motions due by 2/15/2006, (see image 44) (klm,) (Entered: 10/14/2005)
1/25/2006 (p. 218)	45	Unopposed Motion for Extension of Deadlines and for Continuance of Trial by William K Tapscott, Baron & Budd PC) (Entered: 1/25/2006)
1/26/2006 (p. 221)	46	ORDER granting [45] Defendants' Unopposed Motion for Continuance of Deadlines and for Continuance of Trial. Docket Call set for 8/28/2006 09:00 AM before Judge Sidney A Fitzwater, (see order for specifics) (Signed by Judge Sidney A Fitzwater on 1/26/06) (klm,) (Entered: 1/27/2006)

DATE	NO.	PROCEEDINGS
1/26/2006		Set/Reset Deadlines: Plaintiff's Amended Pleadings due by 4/21/2006; Defendants' amended pleadings due by 4/28/06. Discovery due by 4/14/2006. Motions due by 4/28/2006. Status Report due by 4/14/2006 (see image 46) (klm,) (Entered: 1/27/2006)
2/8/2006	47	Vacation Letter as to Jeffrey S. Lynch for dates February 9, 2006; February 10, 2006; March 1, 2006-March 3, 2006; April 20, 2006; April 21, 2006 (klm,) (Entered: 2/8/2006)
2/10/2006 (p. 223)	48	Supplemental Document by William K Tapscott, Baron & Budd PC as to [45] Unopposed MOTION for Extension of Deadlines and for Continuance of Trial. (klm,) (Entered: 2/10/2006)
2/24/2006 (p. 225)	49	Supplemental Designation of Expert Witnesses by Karin Jacobs, Patria Jacobs, JoeAnn Frost. (klm,) (Entered: 2/27/2006)
3/3/2006 (p. 243)	50	Designation of Expert Witnesses by Jeffery Lynch (klm,) (Entered: 3/6/2006
4/6/2006 (p. 246)	51	MOTION to Compel Discovery and Brief in Support Thereof by William K Tapscott, Baron & Budd PC(klm,) (Entered: 4/6/2006)

DATE	NO.	PROCEEDINGS
4/6/2006 (p. 271)	52	ORDER REFERRING MOTION to Judge Kaplan: [51] Motion to Compel Discovery filed by Baron & Budd PC, William K Tapscott (Signed by Judge Sidney A Fitzwater on 4/6/06) (klm,) (Entered: 4/7/2006)
4/10/2006 (p. 272)	53	ORDER: Counsel shall meet face-to-face or confer by telephone in an attempt to resolve all matters in dispute. This conference shall be held by April 17, 2006. The parties shall submit a Joint Status Report by 4/20/2006. The parties shall submit an agreed order in lieu of a joint status report if this discovery dispute is resolved. The agreed order must be signed by all counsel of record and hand delivered to the chambers of Judge Kaplan by April 20, 2006. (Signed by Judge Jeff Kaplan on 4/10/06) (klm,) (Entered: 4/10/2006)
4/12/2006 (p. 275)	54	Joint 2nd MOTION for Modification of Deadlines by Karin Jacobs, Patria Jacobs, JoeAnn Frost, William K Tapscott, Baron & Budd PC (mfw,) (Entered: 4/12/2006)

DATE	NO.	PROCEEDINGS
4/12/2006 (p. 280)	55	ORDER granting [54] Joint Motion for Modification of Deadlines: Completion of Discovery, Filing of Joint Estimate of Trial Length and Status Report – June 2, 2006; Amended of Pleadings: Plaintiffs – June 9, 2006; defendants - June 16, 2006; third-party defendant - June 23, 2006; Motions, including dispositive motions - July 3, 2006; Rule 26 (a)(3) disclosures - July 28, 2006. (Signed by Judge Sidney A Fitzwater on 4/12/06) (klm,) (Entered: 4/13/2006)
4/19/2006 (p. 282)	56	Alternative Dispute Resolution Summary filed Attorneys in Attendance: Jeffrey S. Lynch and Robert M. Greenberg. Prv Fee: $3,600.00 Disposition: DNS (klm,) (Entered: 4/19/2006)
4/19/2006 (p. 283)	57	JOINT STATUS REPORT Regarding Defendants' Motion to Compel Discovery by Karin Jacobs, Patria Jacobs, JoeAnn Frost, William K Tapscott, Baron & Budd PC. (klm,) (Entered: 4/19/2006)
4/21/2006 (p. 285)	58	Second. MOTION to Compel Discovery and Brief in Support Thereof by William K Tapscott, Baron & Budd PC (klm,) (Entered: 4/21/2006)

DATE	NO.	PROCEEDINGS
4/21/2006 (p. 304)	60	ORDER REFERRING MOTION to Judge Kaplan: [58] defendants' Second Motion to Compel Discovery filed by Baron & Budd PC, William K Tapscott (Signed by Judge Sidney A Fitzwater on 4/21/06) (klm,) (Entered: 4/21/2006)
4/21/2006 (p. 305)	61	Amended DOCUMENT by Karin Jacobs, Patria Jacobs, JoeAnn Frost, Jeffery Lynch, William K. Tapscott, Baron & Budd PC. Amendment to [57] Joint Status Report Regarding Defendants' Motion to Compel Discovery. (klm,) (Entered: 4/21/2006)
4/24/2006 (p. 315)	62	***UNFILED PER ORDER OF 5/1/06*** RESPONSE re [61] Amended Joint Status Report Regarding Defendants' Motion to Compel Discovery filed by Bar on & Budd PC. (klm,) Modified on 5/1/2006 (klm,) (Entered: 4/25/2006)
5/1/2006 (p. 320)	63	Order: Defendants response to the amended joint status report on their motion to compel discovery [Doc. #62] is stricken from the record of this case. The clerk is directed to note on the docket that this document has been unfiled. (Signed by Judge Jeff Kaplan on 5/1/06) (klm,) (Entered: 5/1/2006)

DATE	NO.	PROCEEDINGS
5/1/2006 (p. 322)	64	ORDER: Counsel shall meet face-to-face or confer by telephone in an attempt to resolve all matters in dispute. This conference shall be held by May 5, 2006. The parties shall submit a joint status report by 5/9/2006. The parties shall submit an agreed order in lieu of a joint status report if this discovery dispute is resolved. The agreed order must be signed by all counsel of record and hand delivered to the chambers of Judge Kaplan by May 9, 2006 (Signed by Judge Jeff Kaplan on 5/1/06) (klm,) (Entered: 5/1/2006)
5/1/2006 (p. 325)	65	Memorandum Order: Defendants' motion to compel discovery is granted in part and denied in part. The motion is denied with respect to Frost Docs #562-63, 595-96, 600, 601-02, 603-605, 641, 658, 690, 693, 694, 697, and 738 In all other respects, the Motion is granted. All documents withheld by plaintiffs, other than Frost Docs. #562-63, 595-96, 600, 601-02, 603-05, 641, 658, 690, 693, 694, 697, and 738, shall be produced to counsel for defendants by May 12, 2006 (Signed by Judge Jeff Kaplan on 5/1/06) (klm,) (Entered: 5/1/2006)

DATE	NO.	PROCEEDINGS
5/9/2006 (p. 330)	66	ORDER: All parties to this action have agreed to this order, which provided for the production of certain documents withheld by the Plaintiffs under a claim of attorney-client privilege. After considering the terms of this order, the Court is of the opinion that this order is proper and just and should be entered. Plaintiffs are ORDERED to deliver possession of such documents to Defendants within 10 days of the date this order is signed. (Signed by Judge Jeff Kaplan on 5/9/06) (klm,) (Entered: 5/10/2006)
6/2/2006 (p. 332)	67	ESTIMATE OF TRIAL LENGTH AND JOINT STATUS REPORT by Karin Jacobs, Patria Jacobs, Joe-Ann Frost, Jeffery Lynch, William K Tapscott, Baron & Budd PC. (klm,) (Entered: 6/5/2006)
6/9/2006 (p. 336)	68	SECOND AMENDED COMPLAINT against William K Tapscott, Baron & Budd PC filed by Karin Jacobs, Patria Jacobs, JoeAnn Frost (klm,) (Entered: 6/12/2006)
6/16/2006 (p. 364)	69	MOTION to Strike Expert Supplemental Opinions and Brief in Support Thereof by William K Tapscott, Baron & Budd PC(klm,) (Entered: 6/19/2006)

DATE	NO.	PROCEEDINGS
6/16/2006 (p. 376)	70	FIRST AMENDED ANSWER by William K Tapscott, Baron & Budd PC re [1] Complaint, and CROSS-CLAIM against Karin Jacobs, Patria Jacobs filed by William K Tapscott, Baron & Budd PC (klm,) (Entered: 6/19/2006)
6/23/2006 (p. 388)	71	ANSWER to Crossclaim by JoeAnn Frost(svc,) (Entered: 6/26/2006)
6/23/2006 (p. 392)	72	MOTION to Compel Discovery and Brief in Support thereof by Karin Jacobs, Patria Jacobs, JoeAnn Frost (svc,) (Entered: 6/26/2006)
6/23/2006 (p 404)	73	Appendix in Support filed by Karin Jacobs, Patria Jacobs, JoeAnn Frost re [72] MOTION to Compel Discovery (Attachments: # (1) # (2) # (3))(svc,) (Entered: 6/26/2006)
6/26/2006 (p. 591)	74	ORDER REFERRING MOTION to Judge Kaplan: [72] Motion to Compel filed by Karin Jacobs Patria Jacobs JoeAnn Frost, (Signed by Judge Sidney A Fitzwater on 6/26/06) (jib,) (Entered: 6/26/2006)
6/26/2006 (p. 592)	75	RESPONSE filed by Karin Jacobs, Patria Jacobs, JoeAnn Frost re [69] Defendants' MOTION to Strike Expert Supplemental Opinions and Brief in Support Thereof (klm,) (Entered: 6/27/2006)

DATE	NO.	PROCEEDINGS
6/27/2006 (p. 643)	76	ORDER: Counsel shall meet face-to-face or confer by telephone in an attempt to resolve all matters in dispute. This conference shall be held by July 7, 2006. The parties shall submit an agreed order in lieu of a joint status report if this discovery dispute is resolved. The agreed order must be signed by all counsel of record and hand-delivered to the chambers of Judge Kaplan by July 11, 2006. Status Report due by 7/11/2006. (Signed by Judge Jeff Kaplan on 6/27/06) (klm,) (Entered: 6/27/2006)
7/3/2006 (p. 646)	77	***UNFILED PER ORDER OF 7/6/06*** MOTION for Summary Judgment by William K Tapscott, Baron & Budd PC (klm,) Modified on 7/6/2006 (klm,) (Entered: 7/5/2006)
7/3/2006 (p. 650)	78	***UNFILED PER ORDER OF 7/6/06***Brief in Support filed by William K Tapscott, Baron & Budd PC re [77] MOTION for Summary Judgment (klm,) Modified on 7/6/2006 (klm,). (Entered: 7/5/2006)

DATE	NO.	PROCEEDINGS
7/3/2006 (p. 686)	79	***UNFILED PER ORDER OF 7/6/06***Appendix of Exhibits in Support filed by William K Tapscott, Baron & Budd PC re [77] MOTION for Summary Judgment (klm,) Modified on 7/5/2006 (klm,) (Attachments not imaged - see records clerks) Modified on 7/6/2006 (klm,) (Entered: 7/5/2006)
7/6/2006 (p. 687)	80	Order Unfiling [77] MOTION for Summary Judgment filed by Baron & Budd PC, William K Tapscott, [79] Appendix in Support filed by Baron & Budd PC, William K Tapscott, [78] Brief in Support of Motion filed by Baron & Budd PC, William K Tapscott, due to the following deficiency: Does not comply with certain local civil rules of this court. Motion, brief and appendix due by 7/14/2006 (Signed by Judge Sidney A Fitzwater on 7/6/06) (klm,) (Entered: 7/6/2006)
7/11/2006 (p. 689)	81	MOTION for Summary Judgment by William K Tapscott, Baron & Budd PC (klm,) (Entered: 7/11/2006)
7/11/2006 (p. 693)	82	Brief in Support filed by William K Tapscott, Baron & Budd PC re [81] MOTION for Summary Judgment (klm,) (Entered: 7/11/2006)

DATE	NO.	PROCEEDINGS
7/11/2006 (p. 729)	83	Appendix in Support filed by William K Tapscott, Baron & Budd PC re [81] MOTION for Summary Judgment (Attachments: # (1) Appendix # (2) Appendix # (3) Appendix # (4) Appendix # (5) Appendix # (6) Appendix 4 (7) Appendix # (8) Appendix # (9) Appendix # (10) Appendix # (11) Appendix # (12) Appendix # (13) Appendix 4 (14) Appendix # (15) Appendix # (16) Appendix)(klm,) (Entered: 7/11/2006)
7/11/2006 (p. 1132)	84	REPLY to Plaintiffs' Response filed by William K Tapscott, Baron & Budd PC re [69] Defendants' MOTION to Strike Expert Supplemental Opinions (klm,) (Entered: 7/11/2006)
7/11/2006 (p. 1137)	86	JOINT STATUS REPORT by Karin Jacobs, Patria Jacobs, JoeAnn Frost, William K Tapscott, Baron & Budd PC (klm,) (Entered: 7/12/2006)
7/12/2006 (p. 1167)	85	ORDER: The court on its own initiative resets the trial of this case to the two-week docket of Monday, October 30, 2006 before Judge Sidney A Fitzwater. (see order for specifics) (Signed by Judge Sidney A Fitzwater on 7/12/06) (klm,) (Entered: 7/12/2006)

DATE	NO.	PROCEEDINGS
7/13/2006 (p. 1169)	87	MEMORANDUM ORDER granting [72] Plaintiffs' Motion to Compel. All documents responsive to Plaintiffs' First Request for Production Nos. 19, 20 & 21 to Tapscott, Plaintiffs' Second Request for Production Nos. 16-58 to B&B, and Plaintiffs' Third Request for Production Nos. 19 & 20 to B&B shall be produced to counsel for plaintiffs by July 27, 2006. If requested by defendants, the production of any net worth information shall be subject to a protective order to be negotiated by the parties. (Signed by Judge Jeff Kaplan on 7/13/06) (klm,) Modified on 7/14/2006 (klm,) (Entered: 7/13/2006)
7/31/2006 (p. 1174)	88	RESPONSE filed by Karin Jacobs, Patria Jacobs, JoeAnn Frost re [81] MOTION for Summary Judgment (jyg,) (Entered: 8/2/2006)
7/31/2006 (p. 1177)	89	Brief in Support filed by Karin Jacobs, Patria Jacobs, JoeAnn Frost re [88] Response to Motion for Summary Judgment (jyg,) (Entered: 8/2/2006)

DATE	NO.	PROCEEDINGS
7/31/2006 (p. 1206)	90	Appendix in Support filed by Karin Jacobs, Patria Jacobs, JoeAnn Frost re [89] Brief in Support of Response to Motion for Sum mary Judgment (USC-binder not imaged) (jyg,) Additional attachment(s) added on 8/2/2006 (jyg,). Additional attachment(s) added on 8/2/2006 (jyg,) (Entered: 8/2/2006)
8/15/2006 (p. 1210)	91	REPLY to Response filed by William K Tapscott, Baron & Budd PC re [81] MOTION for Summary Judgment (jyg,) (Entered: 8/16/2006)
8/15/2006 (p. 1227)	92	Supplemental Appendix of Exhibits by William K Tapscott, Baron & Budd PC as to [83] Appendix in Support [81] MOTION for Summary Judgment. (jyg,) (Entered: 8/16/2006)
8/15/2006 (p. 1253)	93	ORDER: On August 15, 2006 defendants filed a supplemental appendix in support of their reply brief. Because defendants did not first obtain leave of court to file the appendix, the court will not consider it in deciding defendants' summary judgment motion. (Signed by Judge Sidney A Fitzwater on August 15, 2006) (jyg,) (Entered: 8/16/2006)

DATE	NO.	PROCEEDINGS
8/16/2006 (p. 1254)	94	MOTION for Leave to File Supplemental Appendix in Support of Their Reply Brief by William K Tapscott, Baron & Budd PC with Brief in Support Thereof NOD (jyg,) (Entered: 8/17/2006)
8/22/2006 (p. 1257)	95	MOTION for Leave to File Supplement Authorities by William K Tapscott, Baron & Budd PC with Brief in Support Thereof (jyg,) (Entered: 8/23/2006)
8/23/2006 (p. 1262)	96	ORDER granting [95] Motion for Leave to File Supplement Authorities. It is ordered that Defendants are allowed to file the Supplemental Authority attached to their motion. (Signed by Judge Sidney A Fitzwater on 8/23/2006) (kdc,) (Entered: 8/24/2006)
9/1/2006 (p. 1263)	97	Order Designating Case for ECF - see order for specifics. (Signed by Judge Sidney A Fitzwater on 09/01/2006) (tsc,) (Entered: 9/1/2006)
9/11/2006 (p. 1269)	98	Supplemental Authority in Support by William K Tapscott, Baron & Budd PC as to [81] MOTION for Summary Judgment (klm,) (Entered: 9/12/2006)

DATE	NO.	PROCEEDINGS
9/25/2006 (p. 1271)	99	Memorandum Opinion and Order denying [69] Motion to Strike filed by Baron & Budd PC, William K Tapscott, granting in part and denying in part [81] Motion for Summary Judgment filed by Baron & Budd PC, William K Tapscott, and denying as moot [94] Motion for Leave to File Supplemental Appendix in Support filed by Baron & Budd PC, William K Tapscott - (see order for specifics) (Signed by Judge Sidney A Fitzwater on 9/25/2006) (kdc,) (Entered: 9/25/2006)
9/29/2006 (p. 1307)	100	Rule 26(A)(3) Disclosures by William K Tapscott, Baron & Budd PC, (klm,) (Entered: 9/29/2006)
9/29/2006 (p. 1317)	101	Pretrial Disclosures by Karin Jacobs, Patria Jacobs, JoeAnn Frost, pursuant to Rule 26, Federal Rules of Civil Procedure (jyg,) (Entered: 10/2/2006)
10/27/2006 (p. 1331)	102	Rule 26(A)(3) Pretrial Disclosures by William K Tapscott, Baron & Budd PC (jyg,) (Entered: 10/30/2006)
10/30/2006 (p. 1341)	103	MOTION for Leave to Take Trial Deposition or to Use Pretrial Deposition Testimony at Trial by William K Tapscott, Baron & Budd PC with Supporting Brief (jyg,) (Entered: 10/31/06)

DATE	NO.	PROCEEDINGS
11/8/2006 (p. 1348)	104	RESPONSE filed by Karin Jacobs re [103] MOTION for Leave to Take Trial Deposition or to Use Pretrial Deposition Testimony at Trial *by Plaintiffs* and Supporting Brief (Lynch, Jeffrey) Modified on 11/16/2006 (jyg,) (Entered: 11/8/2006)
11/9/2006		Minute Entry for proceedings held before Judge Sidney A. Fitzwater : Telephone Conference held. The court granted defendants' motion as follows: defendants will produce Donald E. Godwin for a trial-type deposition on Tuesday, November 21, 2006 at Mr. Lynch's office. If Mr. Godwin is available to testify in person at trial, the deposition will not be used at trial, except for impeachment purposes. If Mr. Godwin is unavailable to testify at trial, the deposition will serve as his trial testimony. The court set a telephonic pretrial conference in this case for Tuesday, November 21, 2006 at 2:00 p.m. Attorney Appearances: Plaintiff - Jeffrey S. Lynch; Defense - Robert M. Greenberg with Robert E. Motsenbocker. Time in Court: 44 minutes NO PDF ATTACHED - THIS IS A VIRTUAL MINUTE ENTRY. (ple,) (Entered: 11/14/2006)

DATE	NO.	PROCEEDINGS
11/13/2006 (p. 1356)	105	Proposed Jury Instructions by Karin Jacobs, Patria Jacobs, JoeAnn Frost (Lynch, Jeffrey) (Entered: 11/13/2006)
11/13/2006 (p. 1361)	106	Proposed Jury Instructions and Questions by William K Tapscott, Baron & Budd PC. (jyg,) (Entered: 11/14/2006)
11/13/2006 (p. 1364)	107	MOTION to Allow Voir Dire by Counsel by William K Tapscott, Baron & Budd PC with Brief in Support Thereof. (jyg,) (Entered: 11/14/2006)
11/13/2006 (p. 1367)	108	MOTION in Limine by William K Tapscott, Baron & Budd PC (jyg,) (Entered: 11/14/2006)
11/13/2006 (p. 1370)	109	Proposed Voir Dire Questions by William K Tapscott, Baron & Budd PC (jyg,) (Entered: 11/14/2006)
11/13/2006 (p. 1374)	110	Exhibit List by William K Tapscott, Baron & Budd PC. (jyg,) (Entered: 11/14/2006)
11/13/2006 (p. 1384)	111	Objections to Exhibits included filed by William K Tapscott, Baron & Budd PC re [101] Rule 26A(3) Pretrial Disclosures (jyg,) (Entered: 11/14/2006)
11/13/2006 (p. 1404)	112	Witness List by William K Tapscott, Baron & Budd PC (jyg,) (Entered: 11/14/2006)

DATE	NO.	PROCEEDINGS
11/14/2006 (p. 1406)	113	Exhibit List by Karin Jacobs, Patria Jacobs, JoeAnn Frost, (Lynch, Jeffrey) (Entered: 11/14/2006)
11/14/2006 (p. 1417)	114	Witness List by Karin Jacobs, Patria Jacobs, JoeAnn Frost, (Lynch, Jeffrey) (Entered: 11/14/2006)
11/14/2006 (p. 1421)	115	Proposed Voir Dire by Karin Jacobs, Patria Jacobs, JoeAnn Frost. (Lynch, Jeffrey) (Entered: 11/14/2006)
11/14/2006 (p. 1425)	116	MOTION Motion in Limine by Karin Jacobs, Patria Jacobs, JoeAnn Frost with and Brief in Support Thereof. (Lynch, Jeffrey) (Entered: 11/14/2006)
11/14/2006 (p. 1436)	117	Designation of Deposition by Karin Jacobs, Patria Jacobs, JoeAnn Frost. (Lynch, Jeffrey) (Entered: 11/14/2006)
11/14/2006 (p. 1439)	118	MOTION Objection to Defendants' Evidence - Affirmations by Karin Jacobs, Patria Jacobs, JoeAnn Frost with and Brief in Support Thereof. (Attachments: # (1) Exhibit Correspondence to opposing party) (Lynch, Jeffrey) (Entered: 11/14/2006)
11/14/2006 (p. 1466)	119	Pretrial Disclosures *Amended* by Karin Jacobs, Patria Jacobs, JoeAnn Frost (Lynch, Jeffiey) (Entered: 11/14/2006)

DATE	NO.	PROCEEDINGS
11/14/2006 (p. 1481)	120	MOTION for Leave to File Brief in Support of Motion in Limine by William K Tapscott, Baron & Budd PC. O&C of Brief to Judge (jyg,) (Entered: 11/15/2006)
11/15/2006 (p. 1483)	121	MOTION to Allow Jury Questionnaire by William K Tapscott, Baron & Budd PC (jyg,) (Entered: 11/17/2006)
11/15/2006 (p. 1491)	122	RESPONSE in Opposition filed by William K Tapscott, Baron & Budd PC re [119] Exhibits Contained in Plas' Amended Rule 26A(3) Disclosures (jyg,) (Entered: 11/17/2006)
11/16/2006 (p. 1510)	123	ORDER granting [120] Motion for Leave to File Brief in Support of Motion in Limine. (Signed by Judge Sidney A Fitzwater on November 16, 2006) (jyg,) (Entered: 11/17/2006)
11/16/2006 (p. 1511)	124	Brief in Support filed by William K Tapscott, Baron & Budd PC re [108] MOTION in Limine (jyg,) (Entered: 11/17/2006)
11/16/2006 (p. 1514)	125	ORDER denying [121] Motion to Allow Jury Questionnaire (Signed by Judge Sidney A Fitzwater on November 16, 2006) (jyg,) (Entered: 11/17/2006)

DATE	NO.	PROCEEDINGS
11/20/2006 (p. 1515)	126	RESPONSE in Opposition filed by William K Tapscott, Baron & Budd PC re [105] Proposed Issues and Instructions (jyg,) (Entered: 11/21/2006)
11/20/2006 (p. 1523)	127	RESPONSE filed by William K Tapscott, Baron & Budd PC re [116] MOTION Motion in Limine (jyg,) (Entered: 11/21/2006)
11/20/2006 (p. 1526)	128	MOTION for Leave to File Supplemental Motion in Limine by William K Tapscott, Baron & Budd PC (jyg,) (Entered: 11/21/2006)
11/20/2006 (p. 1528)	129	First MOTION to Continue by William K Tapscott, Baron & Budd PC (jyg,) (Entered: 11/21/2006)
11/20/2006 (p. 1531)	130	Memorandum of Law Related to Defendants' Right to Open and Close filed by William K Tapscott, Baron & Budd PC. (jyg,) (Entered: 11/21/2006)
11/21/2006 (p. 1534)	131	ORDER granting [129] First Motion to Continue (Signed by Judge Sidney A Fitzwater on November 21, 2006) (jyg,) (Entered: 11/21/2006)
11/29/2006 (p. 1535)	132	RESPONSE in Opposition filed by Karin Jacobs, Patria Jacobs, Joe-Ann. Frost re [130] Remark *and Brief in Support Thereof* (Lynch, Jeffrey) (Entered: 11/29/2006)

DATE	NO.	PROCEEDINGS
11/29/2006		Minute Entry for Proceedings held before Judge Sidney A Fitzwater : Status Conference Call held on 11/29/2006. RE: Court's charge Attorney Appearances: Plaintiff - Jeffrey S. Lynch; Defense - Robert Greenberg and Robert E. Motsenbocker. Time in Court: 10 minutes NO PDF ATTACHED - THIS IS A VIRTUAL MINUTE ENTRY. (ple,) Modified on 1/31/2007 (Esquivel, Pat). (Entered: 11/29/2006)
11/29/2006 (p. 1539)	133	ORDER granting [128] Motion for Leave to File Supplemental Motion in Limine. (Signed by Judge Sidney A Fitzwater on November 29, 2006) (jyg,) (Entered: 11/30/2006)
11/29/2006 (p. 1540)	134	Supplemental Document by William K Tapscott, Baron & Budd PC as to [108] MOTION in Limine (jyg,) (Entered: 12/1/2006)
12/1/2006 (p. 1542)	135	ORDER granting in part and denying in part [107] Motion to Allow Voir Dire by Counsel. See order. (Signed by Judge Sidney A Fitzwater on December 1, 2006) (jyg,) (Entered: 12/1/2006)

DATE	NO.	PROCEEDINGS
12/5/2006 (p. 1543)	136	ORDER: Jury Trial set for 2/5/2007 at 09:00 AM before Judge Sidney A Fitzwater. The court will later contact counsel concerning scheduling a telephonic pretrial conference. (Signed by Judge Sidney A Fitzwater on December 5, 2006) (jyg,) (Entered: 12/5/2006)
1/22/2007 (p. 1544)	137	First AMENDED by William K Tapscott, Baron & Budd PC Amendment to [122] Objections to Plaintiffs' Exhibits (jyg,) (Entered: 1/23/2007)
1/29/2007 (p. 1577)	138	MOTION to Lift Witness Rule and Brief in Support Thereof by William K Tapscott, Baron & Budd PC. (klm,) (Entered: 1/30/2007)
1/29/2007 (p. 1580)	139	ORDER granting [138] MOTION to Lift Witness Rule (Signed by Judge Sidney A Fitzwater on 1/29/07) (svc,) (Entered: 1/31/2007)
01/31/07		Minute Entry for proceedings held before Judge Sidney A Fitzwater : Pretrial Conference held on 01/31/07. Attorney Appearances: Plaintiff - Jeffrey S. Lynch; Defense - Robert Greenberg and Robert E. Motsenbocker. Time in Court: 1 hr 16 minutes. NO PDF ATTACHED - THIS IS A VIRTUAL MINUTE ENTRY (ple,) (Entered: 1/31/2007)

DATE	NO.	PROCEEDINGS
1/31/2007 (p. 1581)	140	JOINT FINAL PRETRIAL ORDER. See order for specifics. (Signed by Judge Sidney A Fitzwater on 1/31/07) (svc) (Entered: 2/1/2007)
2/5/2007	141	Proof of Service for Subpoena served on Ashley Higgins Jeter on February 3, 2007, to appear for testimony on 2/5/07 at 9am before Judge Fitzwater., (jyg) (Entered: 2/5/2007)
2/5/2007	142	Jury Roll (jyg) (Entered: 2/6/2007)
2/5/2007 (p. 1596)	143	FIRST AMENDED DOCUMENT by William K Tapscott, Baron & Budd PC. Amendment to [110] Exhibit List (jyg) (Entered: 2/6/2007)
2/5/2007		Minute Entry for proceedings held before Judge Sidney A Fitzwater : Jury Selection, Jury Trial held on 02/05/2007. Voir Dire begins Jury selected, sworn and seated. Adjourned until Tuesday, Feb 6, 2007 at 9:00am. Attorney Appearances: Plaintiff - Jeffrey S. Lynch; Defense - Robert Greenberg and Robert E. Motsenbocker. (Court Reporter Pam Wilson.) Time in Court: 6 hrs 5 minutes. NO PDF ATTACHED THIS IS A VIRTUAL MINUTE ENTRY. (ple) (Entered: 2/7/2007)

DATE	NO.	PROCEEDINGS
2/6/2007		Minute Entry for proceedings held before Judge Sidney A Fitzwater : Second day of Jury Trial held on 02/06/2007. Testimony continues. Adjourned until Wednesday, Feb 7, 2007 at 9:00am. Attorney Appearances: Plaintiff - Jeffrey S. Lynch; Defense - Robert Greenberg and Robert E. Motsenbocker. (Court Reporter Pam Wilson) Time in Court: 6 hrs 30 minutes NO PDF ATTACHED - THIS IS A VIRTUAL MINUTE ENTRY. (ple) Modified on 2/9/2007 (Esquivel, Pat). (Entered: 2/7/2007)
2/7/2007		Minute Entry for proceedings held before Judge Sidney A Fitzwater : Third day of Jury Trial held on 02/07/07. Testimony continues Adjourned until 02/08/07 at 9:00am. Attorney Appearances: Plaintiff - Jeffrey S. Lynch; Defense - Robert Greenberg and Robert E. Motsenbocker. (Court Reporter Pam Wilson.) Time in Court: 6 hrs 30 minutes. NO PDF ATTACHED - THIS IS A VIRTUAL MINUTE ENTRY. (ple) (Entered: 2/9/2007)
2/8/2007 (p. 1606)	144	MOTION for Judgment as a Matter of Law by William K Tapscott, Baron & Budd PC with Brief in Support Thereof. NOD (jyg) (Entered: 2/9/2007)

DATE	NO.	PROCEEDINGS
2/8/2007 (p. 1614)	145	Court's Charge to the Jury & Jury verdict (jyg) Modified on 2/9/2007 (Esquivel, Pat). (Entered: 2/9/2007)
2/8/2007 (p. 1626)	146	Certification of Trial Exhibits filed by Karin Jacobs, Patria Jacobs, JoeAnn Frost, William K Tapscott, Baron & Budd PC. (jyg) (Entered: 2/9/2007)
2/8/2007		Minute Entry for proceedings held before Judge Sidney A Fitzwater : Fourth day of Jury Trial completed on 2/8/2007. Verdict returned in part for the plaintiff. Attorney Appearances: Plaintiff - Jeffrey S. Lynch; Defense - Robert Greenberg and Robert E. Motsenbocker (Court Reporter Pam Wilson) Time in Court: 3 hrs. NO PDF ATTACHED - THIS IS A VIRTUAL MINUTE ENTRY. (ple) (Entered: 2/9/2007)
2/8/2007	147	Jury Notes (USC-not imaged) One envelope (jyg) (Entered: 2/13/2007)
2/22/2007 (p. 1627)	148	ORDER: Set Deadlines as to [144] Motion for Judgment as a Matter of Law. Motion Hearing set for 3/30/2007 at 03:15 PM before Judge Sidney A Fitzwater. (Signed by Judge Sidney A Fitzwater on February 22, 2007 (jyg) (Entered: 2/22/2007)

DATE	NO.	PROCEEDINGS
3/20/2007 (p. 1628)	149	RESPONSE filed by Karin Jacobs, Patria Jacobs, JoeAnn Frost re [144] MOTION for Judgment as a Matter of Law, Plas' Motion for Fee Forfeiture, Plas' Motion for Judgment on the Verdict and Brief in Support Thereof (Lynch, Jeffrey) Modified on 3/21/2007 (Gardner, Jo). (Entered: 3/20/2007)
3/20/2007 (p. 1647)	150	Appendix of Exhibits in Support filed by Karin Jacobs, Patria Jacobs, JoeAnn Frost re [149] Response to Motion as a Matter of Law, Plas' Motion for Fee Forfeiture, Plas' Motion for Judgment on the Verdict and Brief in Support Thereof (Lynch, Jeffrey) Modified on 3/21/2007 (Gardner, Jo). (Entered: 3/20/2007)
3/20/2007		MOTION for Judgment on the Verdict and MOTION for Fee Forfeiture by Karin Jacobs, JoeAnn Frost with Brief in Support Thereof. See [149] for image (jyg) (Entered: 3/29/2007)
3/27/2007 (p. 1732)	151	REPLY in Response filed by William K Tapscott, Baron & Budd PC re [144] MOTION for Judgment as a Matter of Law and Response [149] MOTION for Fee Forfeiture (jyg) (Entered: 3/29/2007)

DATE	NO.	PROCEEDINGS
3/27/2007 (p. 1740)	152	Appendix of Exhibits in Support filed by William K Tapscott, Baron & Budd PC re [151] Reply to Response to Motion re [144] MOTION for Judgment as a Matter of Law and Reponse [149] MOTION for Fee Forfeiture (jyg) (Entered: 3/29/2007)
3/30/2007		Minute Entry for proceedings held before Judge Sidney A Fitzwater : Motion Hearing held on 03/30/2007 re [144] Motion for Judgment filed by Baron & Budd PC, William K Tapscott, Motion for Judgment, Motion for Miscellaneous Relief filed by JoeAnn Frost, Karin Jacobs. Taken under advisement. Written order to follow. Attorney Appearances: Plaintiff - Jeffrey S. Lynch; Defense - Robert Greenberg and Robert E. Motsenbocker. (Court Reporter Pam Wilson) Time in Court: 1 hr 10 minutes, NO PDF ATTACHED - THIS IS A VIRTUAL MINUTE ENTRY. (ple) (Entered: 3/30/2007)

DATE	NO.	PROCEEDINGS
4/12/2007 (p. 1757)	153	Memorandum Opinion and Order granting [144] Motion for Judgment as a Matter of Law filed by Baron & Budd PC, William K Tapscott and denying [149] Motion for Judgment on the Verdict and Motions for Fee Forfeiture filed by JoeAnn Frost, Karin Jacobs. This case is dismissed with prejudice by judgment filed today. See order for details. (Signed by Judge Sidney A Fitzwater on April 12, 2007) (jyg) (Entered: 4/12/2007)
4/12/2007 (p. 1789)	154	JUDGMENT in favor of Baron & Budd PC, William K Tapscott against JoeAnn Frost, Karin Jacobs, Patria Jacobs. Accordingly, for the reasons set out in the memorandum opinions and orders filed September 25, 2006 and today, and based on the part of the jury verdict that favors defendants, it is ordered and adjudged that this suit is dismissed with prejudice. Taxable costs of court, as calculated by the clerk of court, are assessed against plaintiffs (Signed by Judge Sidney A Fitzwater on April 12, 2007) (Entered: 4/12/2007)
4/23/2007 (p. 1791)	155	MOTION for New Trial by Karin Jacobs, Patria Jacobs, JoeAnn Frost (Lynch, Jeffrey) (Entered: 4/23/2007)

DATE	NO.	PROCEEDINGS
4/24/2007 (p. 1796)	156	ORDER denying [155] Motion for New Trial (Signed by Judge Sidney A Fitzwater on April 24, 2007) (jyg) (Entered: 4/24/2007)
5/11/2007 (p. 1797)	157	NOTICE OF APPEAL as to [99] Memorandum Opinion and Order, [153] Memorandum Opinion and Order, [154] Judgment, [156] Order on Motion for New Trial, by Karin Jacobs, Patria Jacobs, JoeAnn Frost. Filing fee $455, receipt number 1725635. (Lynch, Jeffrey) Modified on 5/15/2007 (jmr). (Entered: 5/11/2007)
5/15/2007	158	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re [157] Notice of Appeal. (jmr) (Entered: 5/15/2007)
5/21/2007	159	TRANSCRIPT REQUEST by Karin Jacobs, Patria Jacobs, JoeAnn Frost for proceedings held on 2/5-8/07 Trial before Judge Fitzwater, re [157] Notice of Appeal. Court Reporter: Pam Wilson. (jmr) (Entered: 5/22/2007)
5/23/2007		USCA Case Number 07-10558 for [157] Notice of Appeal, filed by JoeAnn Frost, Patria Jacobs, Karin Jacobs (jmr) (Entered: 5/23/2007)

DATE	NO.	PROCEEDINGS
5/25/2007	160	TRANSCRIPT of Trial filed for dates of 02/05/2007 before Judge Sidney A Fitzwater re [157] Notice of Appeal Court Reporter Name/ Phone Number: Pamela Wilson at 214/267-1616. District Clerk Phone Number: 214/753-2200. ***The Official Record of the transcript is on file with the clerk's office. Contact either the clerk's office or the court reporter at phone numbers listed above to obtain a copy of the Official Record. *** (Volume 1) (axm) (Entered: 5/29/2007)
5/25/2007	161	TRANSCRIPT of Trial filed for dates of 02/06/2007 before Judge Sidney A Fitzwater re [157] Notice of Appeal. Court Reporter Name/ Phone Number: Pamela Wilson at 214/267-1616. District Clerk Phone Number: 214/753-2200. ***The Official Record of the transcript is on file with the clerk's office. Contact either the clerk's office or the court reporter at phone numbers listed above to obtain a copy of the Official Record.*** (Volume 2) (axm) (Entered: 5/29/2007)

DATE	NO.	PROCEEDINGS
5/25/2007	162	TRANSCRIPT of Trial filed for dates of 02/07/2007 before Judge Sidney A Fitzwater re [157] Notice of Appeal. Court Reporter Name/ Phone Number: Pamela Wilson at 214/267-1616 District Clerk Phone Number: 214/753-2200. ***The Official Record of the transcript is on file with the clerk's office Contact either the clerk's office or the court reporter at phone numbers listed above to obtain a copy of the Official Record.*** (Volume 3) (axm) (Entered: 5/29/2007)
5/25/2007	163	TRANSCRIPT of Trial filed for dates of 02/08/2007 before Judge Sidney A Fitzwater re [157] Notice of Appeal. Court Reporter Name/ Phone Number: Pamela Wilson at 214/267-1616 District Clerk Phone Number: 214/753-2200. ***The Official Record of the transcript is on file with the clerk's office. Contact either the clerk's office or the court reporter at phone numbers listed above to obtain a copy of the Official Record.*** (Volume 4) (axm) (Entered: 5/29/2007)
5/29/2007		USCA Case Number 07-10558 for [157] Notice of Appeal, filed by JoeAnn Frost, Patria Jacobs, Karin Jacobs (jmr) (Entered: 5/30/2007)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:04-CV-1968-D

KARIN JACOBS, PATRIA JACOBS
AND JOEANN FROST,
Plaintiffs,

v.

WILLIAM K. TAPSCOTT, JR.
AND BARON & BUDD, P.C.,
Defendants.

PLAINTIFFS' KARIN JACOBS, PATRIA JACOBS AND JOEANN FROST'S NOTICE OF APPEAL

Notice is hereby given that Plaintiffs, Karin Jacobs, Patria Jacobs and JoeAnn Frost, in the above captioned cause, hereby appeal to the United States Court of Appeals for the Fifth Circuit from (1) the Memorandum Opinion and Order granting in part the Defendants' Motion for Summary Judgment dated September 25, 2006; (2) the Memorandum Opinion and Order granting Defendants' Motion for Judgment as a matter of law dated April 12, 2007; (3) the Final Judgment dated April 12, 2007; and (4) the Order denying Plaintiffs' Motion for New Trial dated April 24, 2007

Dated: May 11, 2007,

Respectfully Submitted,

THE LYNCH LAW FIRM

By: /s/ Jeffrey S. Lynch
JEFFREY S. LYNCH
State Bar No, 1272750

13740 Midway Road, Suite 702
Dallas, Texas 75244
(972) 991-0000 — Telephone
(972) 991-0006 — Facsimile

Attorneys For Plaintiffs,
Karin Jacobs, Patria Jacobs
and Joeann Frost and
Counter-Defendant, Joe Ann Frost

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Civil Action No. 3:04-CV-1968-D

KARIN JACOBS, *et al.*,
Plaintiffs,

v.

WILLIAM K. TAPSCOTT, JR., *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

In this action for negligence and related claims arising from a lawyer and his law firm's representation of plaintiffs in state-court asbestos litigation, defendants move for summary judgment and to strike the supplemental opinions of two expert witnesses whom plaintiffs have designated. For the reasons that follow, the court grants the summary judgment motion except as to two grounds of plaintiffs' breach of fiduciary duty claim and their fee forfeiture claim, and it denies the motion to strike.

I

Plaintiffs Karin Jacobs ("Karin"), Patria Jacobs ("Patria"), and JoeAnn Frost ("JoeAnn") sue defendants William K. Tapscott, Jr., Esquire ("Tapscott"), and Baron & Budd, P.C. ("Baron & Budd") based on their representation of plaintiffs in asbestos-related litigation arising from the death of Carl Bernard Jacobs

("Carl").[1] Karin is Carl's widow, and Patria and JoeAnn are his daughters. Carl was employed in shipyards that exposed him to asbestos products for most of his adulthood, and he was ultimately diagnosed with mesothelioma. Before he died, Carl consulted an attorney in New Orleans, Scott Bickford, Esquire ("Bickford"). Bickford's law firm, Martzell & Bickford, accepted his case on a one-third contingency fee employment agreement if the case settled before trial. Bickford later referred the case to Baron & Budd, a firm that is nationally recognized for handling asbestos litigation. Baron & Budd accepted the case based on 40% contingency fee arrangements, evidenced by three employment agreements and powers of attorney signed by Karin, Patria, and JoeAnn.

Defendants filed suit on behalf of plaintiffs and Carl's estate in state courts in Galveston (the "*Jacobs* Litigation") and Dallas counties against numerous asbestos defendants ("*Asbestos* Defendants"). Before the June 1999 trial setting of the *Jacobs* Litigation, defendants negotiated settlements with several Asbestos Defendants and advised Karin, Patria, and JoeAnn that they had reached cash settlements with all Asbestos Defendants for total payments of $2.4 to $2.5 million and perhaps more.

Plaintiffs became dissatisfied with defendants' representation of them. In sum, they complain that the settlement was not for an amount that they had agreed to accept when they retained Baron & Budd, and their

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[1] The court recounts the evidence in a light favorable to plaintiffs, as the summary judgment nonmovants, and draws all reasonable inferences in their favor. *E.g.*, *U.S. Bank Nat'l Ass'n v. Safeguard Ins. Co.*, 422 F.Supp.2d 698, 701 n.2 (N.D. Tex. 2006) (Fitzwater, J.) (citing *Clift v. Clift*, 210 F.3d 268, 270 (5th Cir. 2000)).

case was worth substantially more than what they received in settlement; they were not informed of important details of the settlement, including that it would not be paid entirely in cash, that a settlement had not been reached with Pittsburgh Corning Corporation ("Pittsburgh Corning"), that certain defendants, such as Fibreboard Corporation ("Fibreboard"), were in poor financial condition or bankrupt, that of the $200,000 that Johns-Manville Trust ("Johns-Manville") had agreed to pay to settle, only $20,000 was payable immediately in cash, with virtually no possibility of recovering the $180,000 balance; that defendants did not obtain from the Asbestos Defendants written confirmation or evidence of the settlements and did not protect plaintiffs from the consequences of post-settlement bankruptcy; and that defendants had renegotiated the settlement with Rapid American Corporation ("Rapid American"), reducing the payment from $125,000 to $52,015.00.

Karin, Patria, and JoeAnn sue Tapscott and Baron & Budd on theories of negligence, misrepresentation, breach of fiduciary duty, breach of contract, fee forfeiture, and gross negligence. They seek to recover actual damages, punitive or exemplary damages, attorney's fees, an accounting, fee forfeiture, and pre- and post-judgment interest. Tapscott and Baron & Budd move for summary judgment as to all of plaintiffs' claims.[2]

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[2] Defendants also move for leave to file an appendix in support of their summary judgment reply brief. *See Dethrow v. Parkland Health Hosp. Sys.*, 204 F.R.D. 102, 104 (N.D. Tex. 2001) (Fitzwater, J.) (holding that party may not file summary judgment reply appendix without first obtaining leave of court). The court denies the motion as moot because, even considering the contents of the reply appendix, the court would reach the same result as it does today.

They also move to strike plaintiffs' designation of supplemental opinions for two expert witnesses.

II

Because defendants will not have the burden of proof as to plaintiffs' claims at trial, they can obtain summary judgment by pointing the court to the absence of evidence to support an essential element of each claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once they do so, plaintiffs must go beyond their pleadings and designate specific facts showing there is a genuine issue for trial. *See id.* at 324; *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (per curiam). Summary judgment is mandatory if plaintiffs fail to meet this burden. *Little*, 37 F.3d at 1076. An issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving parties. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Plaintiffs' failure to produce proof as to any essential element renders all other facts immaterial. *Edgar v. Gen. Elec. Co.*, 2002 WL 318331, at *4 (N.D. Tex. Feb. 27, 2002) (Fitzwater, J.) (citing *Celotex Corp.*, 477 U.S. at 323).

III

Defendants move on several grounds for summary judgment dismissing plaintiffs' negligence claim. The court need only consider, however, their contention that plaintiffs cannot prove that defendants' negligence damaged them.

Plaintiffs object to portions of defendants' summary judgment evidence. *See* Ps. Br. 23. Because the court has not relied on any of the evidence to which plaintiffs object, it overrules the objections as moot.

Under Texas law, "[t]he elements of a negligence cause of action are the existence of a legal duty, a breach of that duty, and damages proximately caused by the breach." *IHS Cedars Treatment Ctr. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004). There are similar requirements for a claim for legal malpractice. "To recover on a claim for legal malpractice, a plaintiff must prove that the attorney (1) owed the plaintiff a duty; (2) the attorney breached that duty; (3) the breach proximately caused plaintiff's injuries; and (4) the plaintiff was damaged." *Williams v. Briscoe*, 137 S.W.3d 120, 124 (Tex. App. 2004, no writ) (citing *Greathouse v. McConnell*, 982 S.W.2d 165, 172 (Tex. App. 1998, pet. denied). Moreover,

> [w]hen a legal malpractice claim arises from earlier litigation, the plaintiff also bears the burden to prove he would have prevailed on the underlying cause of action. In addition, a plaintiff must prove the amount of damages he would have recovered and collected in the underlying case if it had been properly prosecuted. Evidence that damages could have been collected is required because, even if an attorney's negligence prevented the entry of a judgment in the client's favor, the client suffered no damage unless he could have collected some part of that judgment. This aspect of plaintiff's burden is commonly referred to as the "suit within a suit" requirement. Thus, to prove that [defendant] committed legal malpractice, appellants had to prove that she failed to bring a medical negligence claim against the dialysis clinic, that the medical negligence claim would have been successful, that it would have resulted in damages, and that those damages would have been collectible.

Id. (citations omitted).

At various points in their brief, defendants point to plaintiffs' inability to prove that defendants' negligence caused plaintiffs to suffer damages. *See* Ds. Br. 9 (no evidence that plaintiffs could have collected more through trial or settlement from solvent defendants, and, without such evidence, they cannot show essential element of injury), 10 (no evidence that any solvent defendant would have agreed to settle for more than it did and that it had financial ability to fund greater settlement, or that judgment could be collected from solvent defendant who would not agree to greater settlement); 12 (no evidence of how much of balances owed by Johns-Manville, Pittsburgh Corning, and Fibreboard would not be collected from their bankruptcies); 14 (no evidence of how much of Pittsburgh Corning settlement they will not receive). In response, plaintiffs maintain that there are genuine issues of material fact that preclude summary judgment, but they do not specifically address the issue of damages. Instead, they merely list these three alleged acts or omissions that they contend are breaches of duty: failing to settle with and to obtain a Tex. R. Civ. P. 11 agreement from Pittsburgh Corning in June 1999; not attempting to enforce Rule 11 agreements obtained from Rapid American and Pittsburgh Corning; and releasing Pittsburgh Corning without its first having paid the agreed consideration. *See* Ps. Br. 22. As defendants point out in their reply brief, plaintiffs have not responded to defendants' argument that their negligence claim fails as a matter of law absent evidence that they were injured by defendants' acts or omissions. *See* Ds. Reply Br. 13. In fact, it appears from plaintiffs' brief that to recover from defendants in this suit, they rely primarily on allegations of breach of fiduciary duty, a claim to which the court turns below. Because plaintiffs have failed to

adduce evidence that would permit a reasonable trier of fact to find that defendants' alleged negligence damaged them, and because this failure renders all other fact issues immaterial, the court grants summary judgment dismissing plaintiffs' negligence claim.

IV

The court next considers plaintiffs' misrepresentation claim. Defendants move for summary judgment on several grounds including that plaintiffs cannot prove the essential element of injury.

Under Texas law, to prove fraud, plaintiffs must establish that defendants

> (1) made a material representation, (2) that was false when made, (3) [they] knew the representation was false, or made it recklessly without knowledge of its truth and as a positive assertion, (4) [they] made the representation with the intent that [plaintiffs] should act upon it, and (5) (plaintiffs] acted in reliance upon it and suffered injury as a result.

Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 322 (5th Cir. 2002) (Fitzwater, J.) (citing *Beijing Metals & Minerals Imp./Exp. Corp. v. Am. Bus. Ctr. Inc.*, 993 F.2d 1178, 1185 (5th Cir. 1993) (applying Texas law)). Defendants have pointed to the absence of evidence that plaintiffs suffered an injury. *See* Ds. Br. 15. In response to defendants' motion, plaintiffs address one of defendants' contentions, and they deny that their misrepresentation claim is simply a fractured or split negligence or legal malpractice claim. *See* Ps. Br. 11-12. They do not, however, attempt to demonstrate that they were injured by an alleged misrepresentation. Section VI of their brief mentions the misrepresentation claim in its cap-

tion, but the body of the brief does not discuss it, focusing instead on breach of fiduciary duty. *See id.* at 14-21. Defendants note in reply that plaintiffs have not responded to their arguments. *See* Ds. Reply Br. 4-5 (noting, *inter alia*, that although misrepresentation claim is mentioned in title, no argument is presented). Absent evidence that would enable a reasonable trier of fact to find that defendants' alleged misrepresentations injured plaintiffs, defendants are entitled to summary judgment dismissing this claim.

V

Defendants seek summary judgment dismissing plaintiffs' breach of contract claim on several grounds. The court need only address their contention that the claim is impermissibly fractured, *i.e.*, that it is essentially a claim for attorney negligence and legal malpractice. Plaintiffs do not directly respond to this argument except to posit the conclusory assertion that this and other claims are not fractured. But the grounds on which they rely in their second amended complaint to establish breach of contract belie this assertion.[3]

"[U]nder Texas law, a plaintiff cannot fracture a legal malpractice claim into multiple causes of action." *Archer v. Med. Protective Co.*, 197 S.W.3d 422, 427

[3] Plaintiffs are limited to the grounds asserted in their second amended complaint. They are not permitted to rely on a ground of which defendants had no notice and thus could not have fairly addressed in their motion. *E.g., N. States Power Co. v. Fed. Transit Admin.*, 358 F.3d 1050, 1057 (8th Cir. 2004) (stating that "while we recognize that the pleading requirements under the Federal Rules are relatively permissive, they do not entitle parties to manufacture claims, which were not pled, late into the litigation for the purpose of avoiding summary judgment ").

(Tex. App. 2006, no writ h.) (citing *Aiken v. Hancock*, 115 S.W.3d 26, 28 (Tex. App. 2003, pet. denied)). Generally, Texas courts "frown on attempts to fracture one cause of action into three or four." *Ross v. Arkwright Mut. Ins. Co*, 892 S.W.2d 119, 133-34 (Tex. App. 1994, no writ) (citing *Sledge v. Alsup*, 759 S.W.2d I, 2 (Tex. App. 1988, no writ)). "If a lawyer's error or mistake is actionable, it should give rise to a cause of action for legal malpractice with one set of issues which inquire if the conduct or omission occurred, if that conduct or omission was malpractice and if so, subsequent issues on causation and damages." Sledge, 759 S.W.2d at 2. "If the gist of a client's complaint is that the attorney did not exercise that degree of care, skill, or diligence as attorneys of ordinary skill and knowledge commonly possess, then that complaint should be pursued as a negligence claim, rather than some other claim." *Deutsch v. Hoover, Bax & Slovacek*, 97 S.W.3d 179, 189 (Tex. App. 2002, no pet.) (citing *Goffney v. Rabson*, 56 S.W.3d 186, 190-94 (Tex. App. 2001, pet. denied)). "The rule against dividing or fracturing a negligence claim prevents legal-malpractice plaintiffs from opportunistically transforming a claim that sounds only in negligence into other claims." *Id.*

Plaintiffs' breach of contract action is based on the following alleged acts or omissions: defendants failed to inform or to keep plaintiffs reasonably informed about the *Jacobs* Litigation, and they made false and untrue statements concerning the settlement to which they had agreed, thus preventing plaintiffs from making an informed decision about whether to settle the case on the terms and for the amounts negotiated, 2d Am. Compl. ¶ 85; defendants failed to inform plaintiffs that, once they executed separate contingent fee agreements, defendants would not communicate with them about settlements or settlement nego-

tiations until after they legally committed them to settle, despite plaintiffs' written requests that they be informed before executing any such documents on their behalf, *id.*,; defendants failed to evaluate the *Jacobs* Litigation properly and intentionally undervalued it, *id.*; before settlement negotiations were conducted and completed, defendants failed to secure written confirmation from and executed by each plaintiff clearly setting forth the amount of authority granted by each, *id.*; defendants misrepresented or omitted material facts that prevented plaintiffs from making an informed decision whether to settle on the terms defendants negotiated, to go to trial, or to release non-settling defendants, *id.* at ¶ 86; defendants failed to obtain a writing that would legally bind each settling Asbestos Defendant in the *Jacobs* Litigation and that could be judicially enforced against any settling Asbestos Defendant who failed to settle, *id.* at ¶ 87; and defendants failed to enforce written settlement agreements that were not funded, *id.* An attorney's alleged failure to keep his client informed about the lawsuit in which he is representing the client, false statements concerning settlement that prevent a client from making an informed decision about settlement, failure to inform a client that the attorney will not communicate about settlement until after the client is legally committed to settle, failure to properly evaluate a lawsuit, failure before settlement negotiations are conducted and completed to secure written confirmation from the client that clearly sets forth the amount of authority granted the attorney, misrepresentation or omission of material facts that prevent a client from making an informed decision whether to settle, try the case, or release non-settling defendants, failure to obtain a writing that would legally bind and be enforceable against a set-

tling defendant, and failure to enforce an unfunded settlement agreement all relate to his failure to exercise the degree of care, skill, or diligence that attorneys of ordinary skill and knowledge commonly possess rather than to his failure to perform his contract with the client.[4]

Accordingly, the court holds that defendants are entitled to summary judgment dismissing plaintiffs' breach of contract action because it is a fractured claim.

VI

Defendants move for summary judgment dismissing plaintiffs' breach of fiduciary duty claim, contending that it is fractured because plaintiffs rely on the same acts and omissions to support this cause of action as are alleged to establish negligence. In reply to plaintiffs' arguments—in which they maintain that their claim is not fractured and assert 13 grounds for proving breach of fiduciary defendants posit that plaintiffs are fracturing a legal malpractice claim, that some of plaintiffs' grounds are not pleaded in their second amended complaint, and that plaintiffs cannot recover on the remaining grounds as a matter of law.

A

The court has summarized above the Texas law of claim fracturing as it applies to claims for negligence asserting legal malpractice. *See supra* V. A claim for negligence, instead of some other claim, should be

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[4] The court does not suggest that plaintiffs' assertions would be deemed improperly fractured negligence claims if made, for example, to support a fraud claim. But it is one thing to say that a lawyer committed fraud rather than malpractice by making a false statement to a client about a settlement; it is quite another to say that the lawyer breached his contract, rather than committed malpractice, by doing so.

asserted if the gravamen of the client's complaint is that the attorney did not exercise the degree of care, skill, or diligence that attorneys of ordinary skill and knowledge commonly possess. *See Deutsch*, 97 S.W.3d at 189. "If, however, the client's complaint is more appropriately classified as another claim, for example, . . . breach of fiduciary duty, . . . then the client can assert a claim other than negligence." *Id.*

In response to defendants' motion, plaintiffs identify 13 grounds for their breach of fiduciary duty claim: (1) improperly using and exercising the powers of attorney in the employment agreements with plaintiffs; (2) failing to recognize that a conflict of interest existed or may have existed between JoeAnn, on the one hand, and Karin and Patria on the other, continuing their representation, and not recommending separate counsel; (3) not confirming and making certain that all parties agreed to the amount of authority to settle; (4) failing to contact plaintiffs and obtain their prior approval and consent to dismiss any parties in the *Jacobs* Litigation; (5) submitting a claim on behalf of Karin only with Johns-Manville, without informing plaintiffs and securing Karin's signature on the claim, resulting in a $20,000 payment to Baron & Budd that was not disclosed to plaintiffs;(6) failing to inform plaintiffs before settling with Johns-Manville that $180,000 of the $200,000 settlement was a worthless note that would never be collected; (7) deliberately lying to plaintiffs and informing them that the entire *Jacobs* Litigation had settled and failing to inform them that Pittsburgh Corning had not settled; (8) failing to inform plaintiffs that extended terms of payment had been granted to Pittsburgh Corning; (9) failing to inform them that the Rapid American settlement was contingent upon other events and unilaterally negotiating a Rule 11 agreement; (10) failing to

inform them they had entered into a fee splitting agreement with Bickford and Martzell & Bickford; (11) failing to prepare the case for trial and having a trial lawyer present for the June 1, 1999 trial setting of the *Jacobs* Litigation; (12) not timely securing Rule 11 agreement with Pittsburg Corning; and (13) entering into aggregate settlements without informing or obtaining the informed consent of plaintiffs.

The court concludes that grounds 2, 3, 4, 5, 6, 8, 9, 11, and 12 are claims for legal malpractice, not for breach of fiduciary duty. In ground 2, plaintiffs allege that defendants failed to recognize a possible conflict of interest among the plaintiffs and continued their representation without recommending separate counsel. This is an assertion that defendants did not exercise the degree of care, skill, or diligence that attorneys of ordinary skill and knowledge commonly possess.[5] The gist of grounds 3, 4, 5, 6, 8, and 9 is defendants' purported failure to keep plaintiffs adequately informed and to communicate with them regarding matters relevant to the *Jacobs* Litigation and settlement, and thus they are negligence claims. *See Archer*, 197 S.W.3d at 427 (holding claims that attorney neglected matters, mis-evaluated case, and failed to communicate with client "can be viewed as claims involving legal malpractice"). Allegation 11 relates to defendants' purported lack of preparation for and attendance at trial. Ground 12 refers to defendants' purported failure to timely secure a Rule 11 agreement

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[5] The court recognizes that a claim for breach of fiduciary can be based on the attorney's failure to disclose his own conflict of interest without impermissibly fracturing a negligence claim. *See Deutsch*, 97 S.W.3d at 190-91. Here, however, plaintiffs are asserting a conflict among themselves, not with their lawyers.

with a settling defendant. Both are patently claims of attorney conduct below the standard of care.

B

This leaves for consideration grounds 1, 7, 10, and 13. Ground 1 refers to defendants' purported improper use and exercise of the powers of attorney contained in the employment agreements. Plaintiffs contend that the powers of attorney did not grant defendants the right to settle the *Jacobs* litigation without consulting them. According to plaintiffs, by doing so, defendants "gained the benefit of attorney's fees improperly thereby and avoided the necessity and expense of a jury trial." Ps. Br. 17. An attorney's "pursuit of his own pecuniary interests over the interests of his client . . . can be viewed as claims involving breached fiduciary duties." *Archer*, 197 S.W.3d at 427-28 (citing *Aiken*, 115 S.W.3d at 28).[6] Thus the claim is not improperly fractured.

Ground 10—that defendants failed to inform plaintiffs that they had entered into a fee splitting agreement with Bickford and Martzell & Bickford—could arguably be deemed fractured because it allegedly involves a mere failure to communicate. Because the

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[5] Ground 5 is distinguishable from this allegation. Although ... ground 5 plaintiffs allege that defendants submitted a claim on Karin's behalf only with Johns-Manville, did not inform them or obtain Karin's signature, and received a $20,000 payment that they did not disclose to plaintiffs, they do not aver that defendants obtained the $20,000 payment in their self-interest as attorney's fees. In fact, plaintiffs otherwise complain that defendants secured a settlement with Johns-Manville for $200,000, of which $180,000 was a worthless note that would never be collected. In other words, the $20,000 payment is allegedly the cash portion of the Johns-Manville settlement, not an undisclosed payment of attorney's fees.

claim alleges non-disclosure of an attorney's fee arrangement, and since the court is deciding below that the claim is barred for other reasons, the court will assume arguendo that it is not a fractured negligence claim.

In ground 7, plaintiffs allege that defendants deliberately lied to them and told them the entire *Jacobs* Litigation had settled, without telling them that Pittsburgh Corning had not settled. "The attorney-client relationship is highly fiduciary in nature." *Judwin Props., Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 506 (Tex. App. 1995, no writ) (citing *O'Dowd v. Johnson*, 666 S.W.2d 619, 621 (Tex. App. 1984, writ ref'd n.r.e.)). "This relationship carries the utmost good faith." *Id.* (citing *State v. Baker*, 539 S.W.2d 367, 374 (Tex. Civ. App. 1976, writ ref'd n.r.e.)). "Attorneys owe their clients a fiduciary duty of 'most abundant good faith,' requiring absolute perfect candor, openness, and honesty, and the absence of any concealment or deception." *Combs v. Gent*, 181 S.W.3d 378, 384 (Tex. App. 2005, no writ h.) (citing *Deutsch*, 97 S.W.3d at 196). This predicate for breach of fiduciary duty—an alleged deliberate lie rather than a mere failure to communicate or inform—is not improperly fractured.

In ground 13, plaintiffs contend that defendants breached their fiduciary duty by entering into aggregate settlements without informing plaintiffs or obtaining their informed consent. This can be the basis of a claim for breach of fiduciary duty. *See Arce v. Burrow*, 958 S.W.2d 239, 245 (Tex. App. 1997), *aff'd* as modified, 997 S.W.2d 229 (Tex. 1999). Consequently, it is not an improperly fractured negligence action.

Accordingly, the court holds that all of plaintiffs' predicates for breach of fiduciary duty are improperly fractured from a negligence claim, except grounds 1, 7, 10, and 13.

C

In their reply brief, defendants challenge grounds 1, 7, 10, and 13 on additional grounds.

1

As to ground 1, defendants reply that it is undisputed that plaintiffs were satisfied with the total amount of the settlement and were expecting to receive $1.5 million. They also assert that plaintiffs have pointed to no evidence that they were injured by a misuse of the powers because they have failed to identify evidence that tends to prove that they could have collected more from solvent defendants had they rejected the settlement. The court disagrees. There is a genuine issue of material fact whether Plaintiffs were satisfied with the settlement. And "in the context of the attorney-client relationship, proof of damages is not required with a request for fee forfeiture in a breach of fiduciary duty claim." *Spera v. Fleming, Hovencamp & Grayson, P. C.* 25 S.W.3d 863, 873 (Tex. App. 2000, no pet.) (citing *Arce*, 958 S.W.2d at 251); *Arce*, 958 S.W.2d at 244-45 ("To be entitled to the remedy of fee forfeiture, [plaintiffs] do not have to prove [defendants] caused actual damage—proof of a breach is enough.").

2

As to ground 7, defendants maintain that Tapscott announced the settlement based on advice from a person who was handling settlements with Pittsburgh Corning and confirmed the settlement, but

Pittsburgh Corning's counsel backed out of the settlement. They also point to the absence of evidence that plaintiffs were harmed, because Pittsburgh Corning again agreed to settle when the case came up for trial in November 1999, an agreed judgment was executed in January 2000, and plaintiffs cannot show that a settlement reached in June 1999 would have been collected.

The court declines to consider these grounds for granting summary judgment as to ground 7. When defendants moved for summary judgment with respect to plaintiffs' breach of fiduciary duty claim, they did so only on the basis of claim fracturing.[7] It is error to grant summary judgment on a ground not raised. E.g., *John Deere Co. v. Am. Nat'l Bank, Stafford*, 809 F.2d 1190, 1192 (5th Cir. 1987). And the court will not consider an argument raised for the first time in a reply brief. E.g., *Senior Unsecured Creditors' Comm. of First RepublicBank Corp. v. FDIC*, 749 F. Supp. 758, 772 (N.D. Tex. 1990) (Fitzwater, J.). Accordingly, the court declines to grant summary judgment dismissing this component of plaintiffs' breach of fiduciary duty claim.[8]

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[7] In their brief, defendants include in their concluding statement the assertion that "Plaintiffs do not allege facts to support a breach of fiduciary duty claim and are impermissibly fracturing their negligence claims." Ds. Br. 23. But in the next sentence, they assert that "such claims should be dismissed as a matter of law because they are subsumed in plaintiffs' negligence claims." *Id.* Accordingly, defendants' single reference to plaintiffs failure to "allege facts to support a breach of fiduciary duty claim" did not place plaintiffs on notice that they were required to do more than show that their claim was not fractured.

[8] Although the court could raise this ground sua sponte and consider granting summary judgment after affording plaintiffs

3

Defendants point out that grounds 10 and 13 are not alleged in plaintiffs' second amended complaint. This is not an argument that defendants were obligated to raise in their motion, because plaintiffs did not rely on these predicates as bases for relief until they did so for the first time in opposing defendants' summary judgment motion. Plaintiffs cannot avoid summary judgment, however, based on unpleaded claims. *See supra* note 3. The court therefore grants summary judgment dismissing grounds 10 and 13 of plaintiffs' breach of fiduciary duty claim.

Accordingly, the court grants in part and denies in part defendants' motion for summary judgment as to plaintiffs' breach of fiduciary duty claim.

VII

Plaintiffs also assert a cause of action for gross negligence. Defendants contend that plaintiffs cannot establish this claim. *See* Ds. Br. 25. Under Texas law, gross negligence is defined as an act or omission

> (A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Tex. Civ. Prac. & Rem. Code Ann. § 41.001(11) (Vernon Supp. 2006).

Plaintiffs have not responded to defendants' argument. Section VI of their brief mentions gross negli-

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an opportunity to respond, because ground 1 of this claim remains to be tried, the court declines to do so.

gence in its caption, but the body of the brief does not discuss it, focusing instead on breach of fiduciary duty. *See* Ps. Br. 14-21. Defendants note in reply that plaintiffs have not responded. *See* Ds. Reply Br., 4-5 (noting, *inter aria*, that although gross negligence is mentioned in title, no argument is presented). Absent evidence that would enable a reasonable trier of fact to find that defendants committed acts or omissions that qualify as grossly negligent under § 41.001(11), defendants are entitled to summary judgment dismissing this claim.

VIII

Plaintiffs also seek an accounting and allege a claim for fee forfeiture. As with other claims addressed above, defendants have pointed to the absence of evidence to support these actions, *see* Ds. Br. 26-27, plaintiffs have mentioned them in the caption to Section VI of their brief, *see* Ps. Br. 14, but the body of the brief does not discuss accounting or fee forfeiture, focusing instead on breach of fiduciary duty, *see id.* at 14-21. Defendants note in reply that plaintiffs have not responded to their arguments. *See* Ds. Reply Br. 4-5 (noting, *inter alia*, that although accounting and fee forfeiture are mentioned in title, no arguments are presented). The court concludes that they are entitled to summary judgment as to plaintiffs' request for an accounting in the absence of evidence that would permit a reasonable trier of fact to find in plaintiffs' favor on these claims.

Because the court has in part denied summary judgment as to plaintiffs' breach of fiduciary duty claim and has concluded that the remedy of fee forfeiture is available even without a showing of actual damages, the court denies the motion to that extent.

IX

Defendants move for summary judgment dismissing plaintiffs' claim for attorney's fees on the ground that fees are unavailable other than for breach of contract, and that this basis should be eliminated through summary judgment. Plaintiffs respond with the conclusory assertion that they can recover attorney's fees for breach of contract or as an element of exemplary damages. Defendants reply that the breach of contract claim should be dismissed, that the only basis for punitive damages is plaintiffs' claim for gross negligence, and that attorney's fees cannot be recovered as an element of punitive damages under Tex. Civ. Prac. & Rem, Code Ann. § 41.001 *et seq*.

Because the court has granted summary judgment dismissing plaintiffs' claim for breach of contract, that action cannot serve as the basis to recover attorney's fees. Moreover, under Texas law, the factors to be considered in awarding exemplary damages are prescribed by statute. *See* Tex. Civ. Prac. & Rem. Code Ann. § 41.011 (a) (Vernon 1997). Assuming *arguendo* that plaintiffs can recover exemplary damages,[9] they

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[9] Before § 41.003 was amended effective September 1, 2003, Texas courts had held that, because breach of a fiduciary duty was a tort, exemplary damages were recoverable for such a breach. *See Hawthorne v. Guenther*, 917 S.W.2d 924, 936 (Tex. App. 1996, writ denied) (citing *Murphy v. Canion*, 797 S.W.2d 944, 949 (Tex. App. 1990, no writ)). With exceptions not pertinent here, under the version of Tex. Civ. Prac. & Rem. Code Ann. § 41.003 (Vernon Supp. 2006) that controls suits filed on or after its effective date, exemplary damages can be awarded only if the claimant proves by clear and convincing evidence that the harm for which the claimant seeks exemplary damages resulted from fraud, malice, or gross negligence. Even before 2003, however, Texas courts had held that "participation in a breach of fiduciary duty can be the basis of an award of

have cited no authority that holds that the trier of fact can consider their attorney's fees when awarding exemplary damages, and the court has located a Texas case that suggests that they cannot be considered under facts like those here. *See Hawkins v. Owens*, 2000 WL 1199254, at *10 (Tex. App. Aug. 24, 2000, pet. denied) (not designated for publication) (holding that consideration of attorney's fees as factor in fixing exemplary damages was improper based on facts of case because they could not. be considered as factor in breach of contract case, and that joining claims in tort with contract claims did not alter fundamental rule that breach of contract could not support recovery of exemplary damages on contract claim) (citing *Grace Petroleum Corp. v. Williamson*, 906 S.W.2d 66, 69 (Tex. App. 1995, no writ)). Accordingly, the court grants summary judgment dismissing plaintiffs' claim for attorney's fees.

X

The court now considers defendants' motion to strike expert supplemental opinions.

A

After the court-ordered deadline for providing expert reports and on the eve of the June 2, 2006 discovery deadline, plaintiffs served a May 31, 2006 letter of Mark A. Hendrix, Esquire ("Hendrix") and a June 2, 2006 letter of Peter E. Ferraro, Esquire ("Ferraro"), experts whom plaintiffs had designated,

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exemplary damages where the jury finds the defendant acted with fraud or malice." *Fid. Nat'l Title Ins. Co. v. Heart of Tex. Title Co.*, 2000 WL 13037, at *8 (Tex. App. Jan. 6, 2000, pet. denied). The court therefore assumes *arguendo* that proof of a fraud-based breach of fiduciary claim would enable plaintiffs to recover exemplary damages in this case.

that contained supplemental opinions. Defendants contend these opinions address matters not contained in the original reports of the witnesses and are additional opinions rendered after Hendrix and Ferraro were deposed on April 19, 2006. They also assert that Ferraro's supplement addresses matters that, in view of his deposition testimony, are totally irrelevant. In particular, defendants posit that, despite Hendrix's deposition testimony that he was not expressing an opinion on the general value of mesothelioma cases or on the *Jacobs* Litigation, in his supplemental letter he opines that no one at Baron & Budd evaluated the case as low as $1 million, if such a valuation was made it was not reasonable, and a more reasonable valuation of the case would be between $2.5 and $3 million. They cite Ferraro's deposition testimony that, although he valued the case at the low end of $3 million, there was no negligence involved in settling the case or telling plaintiffs that they had settled the case for $2.5 or $2.6 million. And they complain that he now opines that a $1 million valuation was not reasonable and a settlement in the range of approximately $3 million was reasonable. Defendants argue that the experts' supplemental disclosures violate Fed. R. Civ. P. 26(a)(2)(B) and (C) because they were not contained in the witnesses' expert reports, were made after the witnesses were deposed, and were not disclosed until defendants were out of time to re-depose them. They move to strike the new opinions contained in the supplemental letters.

Plaintiffs respond that the experts made minor additions and supplements to their opinions, the supplementation was limited solely to the valuation of the settlement as it applied to the *Jacobs* Litigation, in the depositions of Hendrix and Ferraro the subject of valuation was discussed and testimony was offered

during examination by defendants' counsel, and Ferraro's expert report contains his opinion that the settlement value had a low-end range of $3 million. They also argue that they moved to compel defendants to produce the documents that relate to the verdicts and settlements in mesothelioma cases that are referenced on the Baron & Budd website. And they maintain that defendants are not prejudiced by the supplementation because the attorneys have discussed re-deposing the experts if changes or additions are made to their opinions, they made allowance in their June 2, 2006 status report for conducting supplemental depositions of experts, plaintiffs do not oppose re-deposing the experts, other remaining witnesses will opine concerning the value of the *Jacobs* Litigation, and the supplemental depositions are neither irrelevant nor a surprise.

B

Although as the court explains below its assesses under the same four factors whether to strike the supplemental opinions of Ferraro and Hendrix, the reasons for applying these factors differ as to each witness. This is because Ferraro included in his expert report an opinion regarding the settlement value of the claims in the *Jacobs* Litigation, but there is no indication in the record of, and plaintiffs do not identify, the opinion that Hendrix expressed in his original report that he purports to supplement in his letter. The court therefore analyzes Ferraro's supplemental opinions under the supplementation standard and assesses Hendrix's opinions under the standard for undesignated experts.

1

In Ferraro's original expert report, he stated that "[i]n my opinion, the settlement value of the claims had a low end range value of $3,000,000.00." Ps. Resp. Ex. 4 at 10, ¶ 1 45.[10] His June 2, 2006 letter supplements his opinion, stating that "[a] one million dollar valuation . . . was not reasonable considering the facts of the case" and the quality, caliber, and record of success of Baron & Budd; "[t]he actual total settlement amount of the case had it been recovered was more realistic"; and "the total settlement in the range of three million dollars plus or minus was reasonable." Ds. Mot. Strike Ex. D.[11]

Rule 26(a)(2)(B) provides that the disclosure of certain expert witnesses must be accompanied by a written report that contains, *inter alia*, "a complete statement of all opinions to be expressed." Rule 26(a)(2)(C) establishes the default deadlines and sequence for making such disclosures when the court has not otherwise directed or the parties have not otherwise stipulated. Rule 26(e) addresses the duty to supplement or correct Rule 26(a) disclosures and discovery responses.

> Rule 26(e)(1) requires that, with respect to the retained expert, there is a duty to supplement the expert's opinion if there is a material change

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[10] The court has cited this exhibit rather than an appendix page because plaintiffs did not submit the required evidence appendix in briefing this motion. *See* N.D. Tex Civ. R. 7.1(i)(1) ("A party who relies on documentary (including an affidavit, declaration, deposition, answer to interrogatory, or admission) or non- documentary evidence to support or oppose a motion must include such evidence in an appendix.")

[11] Defendants also failed to include their evidence in an appendix. *See supra* note 10.

> in the opinion. This obligation extends to both the report required by Rule 26(a) (2)(B), as well as the expert's deposition testimony.

Sullivan v. Glock, Inc., 175 F.R.D. 497, 502 (D. Md. 1997). Ferraro's June 2, 2006 letter qualifies as a supplementation of the opinion disclosed in his initial report because supplementation includes material changes to an expert's opinion.

"This supplementation must occur not later than the date of the pretrial disclosures required by Rule 26(a)(3)." *Id.*; *see Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 570 n.43 (5th Cir. 1996) ('Rule 26(e)(1) requires that supplementation of expert disclosures be made by the time the supplementing party's 'Pretrial Disclosures' are due." (citing Rule 26(e) (1))). The court can by order impose an earlier supplementation deadline. *See, e.g., Sullivan*, 175 F.R.D. at 506 (holding in context of retained expert witnesses that "[c]ounsel must be prepared to provide full and meaningful disclosure and discovery at the times required by the . . . pretrial scheduling order."). In this case the court imposed deadlines for designating expert witnesses and a discovery deadline that it periodically modified at the parties' request. It intended that expert disclosures and supplementations be made sufficiently in advance of the court-imposed discovery deadline so that the parties could by that deadline depose opposing experts on all opinions to be expressed at trial. This intent is usually clear to parties litigating in this court. and is typically followed in practice. But absent an explicit directive that required a party to supplement expert opinions before the discovery cut-off, a party could have concluded that the obligation to do so was controlled by the deadline specified by Rule 26(e) (1): *i.e.*,

the deadline for Rule 26(a) (3) pretrial disclosures. In an April 12, 2006 order, which the court entered in response to the parties' joint motion, it set July 28, 2006 as the deadline for Rule 26(a)(3) disclosures. Accordingly, under Rule 26(e)(1), the supplementation of Ferraro's original expert report was not due until July 28, 2006.

At the time the court filed the order, July 28 was 30 days in advance of the then-existing trial setting.[12] Courts have noted that problems can arise from application of a rule that allows supplementation of expert opinions so close to trial. For example, in *Tucker v. OHTSU Tire & Rubber Co.*, 49 F.Supp.2d 456 (D. Md. 1999), the court observed that

> in light of the large window of time allowed by [Rule 26(a)(2)(B), Rule 26(e)(1), and a local rule] to supplement expert disclosures, the Court should not automatically permit testimony at trial as to the newly discovered information if, considering the facts of the case, it is convinced that doing so would be unfair or cause undue delay or expense.

Id. at 461. The court reasoned that

> [i]n making such a determination, the Court should consider the following factors: (1) the explanation for making the supplemental disclosure at the time it is made; (2) the importance of the supplemental information to the proposed testimony of the expert, and the expert's importance to the litigation; (3) potential prejudice to an opposing party; and (4) the availability of a continuance to mitigate any prejudice.

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[12] In effect, the parties by agreement applied the 30-day default disclosure proviso of Rule 26(a)(3).

Id. As is clear from the discussion below concerning Hendrix, these four factors are identical in concept, if not in language, to the ones this court uses when it decides whether to exclude an expert who was not properly designated. *See Cont's Cas. Co. v. St. Paul Fire & Marine Ins. Co.*, 2006 WL 2506957, at *3 (N.D. Tex. Aug. 15, 2006) (Fitzwater, J.) (quoting *Wright v. Blythe-Nelson*, 2001 WL 804529, at *2 (N.D. Tex. July 10, 2001) (Fitzwater, J.)). The Fifth Circuit applies similar factors when it performs a Rule 37(c) (1) harmless error analysis to determine whether the district court has properly exercised its discretion in allowing expert testimony when Rule 26(a) has been violated. *See, e.g., Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 563-64 (5th Cir. 2004) (quoting *Tex. A & M Research Found. v. Magna Transp., Inc.*, 338 F.3d 394, 402 (5th Cir. 2003)). The court concludes that it should use them to decide whether to strike plaintiffs' supplementation of Ferraro's opinion.

2

The record related to defendant's motion to strike does not disclose, and plaintiffs do not specify in their response, the opinion in Hendrix's initial report that he purported to supplement through his May 31, 2006 letter.[13] Accordingly, his so-called supplemental

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[13] It can be inferred from plaintiffs' response that Hendrix offered some opinions, because they maintain that each expert witness "made minor additions and supplements by way of a letter supplementing their initial expert disclosures," and they assert that "the supplemental reports . . . is not the first time the topic has been raised or covered." Ps. Resp. 1. They do not, however, specify what his initial opinion was, and, unlike concerning Ferraro, they have not included a copy of Hendrix's initial expert witness report in response to defendants' motion.

opinion should be treated as an undisclosed opinion and analyzed under the factors that the court would apply in deciding whether to permit the testimony of an expert who was not properly designated. 'The purpose of supplementary disclosures is just that—to supplement. Such disclosures are not intended to provide an extension of the expert designation and report production deadline." *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 324 (5th Cir. 1998).

> In deciding whether to exclude the testimony of an expert witness whom a party did not properly designate, the court's discretion is guided by considering the following factors: "(1) the explanation for the failure to identify the witness, (2) the importance of the testimony, (3) the potential prejudice in allowing the testimony, and (4) the availability of a continuance to cure such prejudice."

Cont'l Cas., 2006 WL 2506957, at *3 (quoting *Wright*, 2001 WL 804529, at *2).

C

Because the court essentially evaluates under the same four factors whether to allow the supplemental opinions of Ferraro and Hendrix, it will address both witnesses together.

1

The court first considers plaintiffs' explanation for their failure. They do not offer an explicit explanation. Implicitly, they maintain that the supplemental letters make minor additions and changes to the witnesses' opinions.

The only minor change, however, is Ferraro's change of opinion from his original report—that the settlement value of the claims had a low-end range value of $3 million—to the one in his supplemental letter—that a settlement in the range of approximately $3 million was reasonable. Otherwise, he is offering new opinions. And as already noted, Hendrix is not shown to have provided a specific relevant opinion in his original report.

2

The court next addresses the importance of the testimony. Although the opinions of Hendrix and Ferraro may have somewhat diminished importance in view of the court's summary judgment ruling, the evidence appears to be important. For example, their opinions could have probative value in establishing the validity of plaintiffs' breach of fiduciary duty claim based on the assertion that defendants' used the powers of attorney to gain the benefit of attorney's fees and to avoid the necessity and expense of a jury trial. The value of the *Jacobs* Litigation in relation to the amount of the settlement might reveal a motive to settle for less than the worth of the case, in order to enhance the certainty of obtaining attorney's fees or to eliminate the expenses of a jury trial.

3

The remaining two factors focus on prejudice: the prejudice to defendants of allowing the evidence, and the possibility of curing the prejudice through a continuance. *See MGE UPS Sys., Inc. v. Fakouri. Elec. Eng'g, Inc.*, 2006 WL 680513, at *5 (N.D. Tex. Mar. 14, 2006) (Means, J.) ("However, the issue is whether the failure of the Fakouri defendants to properly designate the subject matter of Rustrum's testimony

is harmful to MGE.") The burden is on plaintiffs to show that defendants will not be unduly prejudiced. *Cont'l Cas.*, 2006 WL 2506957, at *3 (citing *Wright*, 2001 WL 804529, at *5).

The court recognizes that a party can be unduly prejudiced by the timing of expert opinion disclosures, whether through supplementation or by designation of a previously undisclosed expert. *See, e.g., Sharpe v. United States*, 230 F.R.D. 452, 462 (E.D. Va. 2005) ("To permit the plaintiff additional time to amend her expert disclosures would work unjustifiable hardship upon the defendant in attempting to complete discovery and prepare for trial within the confines of the court's scheduling order." (citing *Tucker*, 49 F.Supp.2d at 460)). Granting a continuance can also cause undue prejudice to the opposing party, who itself may have fully complied with the rules and is ready for its day in court. Plaintiffs argue for five reasons that defendants will not suffer undue prejudice. In their reply, defendants do not seriously complain that they would incur undue prejudice if the court allows the supplemental opinions but also permits defendants to re-depose the witnesses. They seem to focus more on plaintiffs' failure to follow the rules, specific deficiencies in plaintiffs' reasoning, the prejudice that would be visited on them if they are not able to re-depose the witnesses, and prejudice to their pending summary judgment motion.

As is apparent from the court's decision today, the testimony of these witnesses has not precluded defendants from obtaining summary judgment on a basis on which they would have otherwise prevailed. The supplemental opinions of these experts have not at all impacted the court's summary judgment ruling. Plaintiffs have offered to allow defendants to re-depose

the witnesses. And although it does not appear that a continuance is ineluctable, one would be available if needed to address any prejudice to defendants from the timing of the depositions. The court assumes that if defendants believe they need to re-depose Hendrix and Ferraro to ameliorate prejudice, the depositions can be taken promptly by agreement. Consequently, there is no showing that a continuance would unduly prejudice defendants, other than as a function of allowing the expert opinions at all. But this fact cannot be sufficient to exclude their testimony, or courts would never allow a party to cure a failure to disclose or supplement.

Considering the four factors, the court holds that the opinions in the supplemental letters should not be stricken.

D

A primary premise of defendants' motion is that these witnesses have expressed opinions that are contrary to, or inconsistent with, those given in their depositions. Under Rule 26(e)(1), a Rule 26(a) (2)(B)-type expert must supplement his deposition testimony if there is a material change in his opinion. *Sullivan*, 175 F.R.D. at 502. Therefore, the court's analysis of the four factors largely applies to Ferraro's supplemental opinions given after his deposition. It also pertains to Hendrix's opinions that were not disclosed in his deposition or in a report. Accordingly, the court's decision does not change when the opinions in the supplemental reports are compared to the witnesses' deposition testimony. Of course, given the deposition testimony, these two witnesses are virtually certain to face trenchant cross-examination that subjects them to impeachment at trial.

Defendants' July 11, 2006 motion for summary judgment is granted in part and denied in part. Their June 16, 2006 motion to strike expert supplemental opinions is denied. Defendants' August 16, 2006 motion for leave to file supplemental appendix in support of their reply brief is denied as moot.

SO ORDERED.,

September 25, 2006.

/s/ Sidney A. Fitzwater
Sidney A. Fitzwater
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed Feb. 8, 2007]

Civil Action No. 3:04-CV-1968-D

KARIN JACOBS, *et al.*,
Plaintiffs,

v.

WILLIAM K. TAPSCOTT, JR., *et al.*,
Defendants.

COURT'S CHARGE TO THE JURY

MEMBERS OF THE JURY:

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you and to apply that law to the facts as you find them from the evidence in the ease. You are not to single out one instruction as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.,

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your

swam duty to base a verdict upon any view of the law other than that given in these instructions, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. The parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated in these instructions, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community and holding the same or similar stations in life. The law is no respecter of persons, and all persons, including professional corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses, the exhibits admitted in the record, and the stipulated facts. Stipulated facts must be regarded as proven facts. The term "evidence" does not include anything that I have instructed you to disregard.

Evidence admitted before you for a limited purpose may not be considered for any purpose other than the limited purpose for which it was admitted.

Remember that any statements, objections, or arguments made by the lawyers are not evidence in the

case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case and, in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you. If an attorney's question contained an assertion of fact that the witness did not adopt, the assertion is not evidence of that fact.

You are not bound by any opinion that you might think I have concerning the facts of this case, and if I have in any way said or done anything that leads you to believe that I have any opinion about the facts in this case, you are instructed to disregard it. Further, nothing in these instructions to you is made for the purpose of suggesting or conveying to you an intimation as to what verdict I think you should find.

Although you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts established by the evidence in the case.

You should not be concerned about whether the evidence is direct or circumstantial "Direct evidence" exists when the evidence directly establishes the facts that a party asserts to be true, such as by an eyewitness or in a document. "Circumstantial evidence" is proof of a chain of facts and circumstances that, without going directly to prove the existence of an essential fact, gives rise to a logical inference that

such fact does actually exist The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the "credibility" or believability of each witness and the weight to be given to the witness' testimony. In weighing the testimony of a witness, you should consider' the witness' relationship to a particular party; the witness' interest, if any, in the outcome of the case; the witness' manner of testifying; the witness' opportunity to observe or acquire knowledge concerning the facts about which the witness testified; the witness' candor, fairness, and intelligence; and the extent to which the witness' testimony has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness, in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or nonexistence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be "impeached" or discredited by contradictory evidence, by a showing that the witness testified falsely concerning a material matter, or by evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness' present testimony. If you believe that any witness has been so impeached, it is your exclusive province to give the testimony of

that witness such credibility or weight, if any, as you think it deserves.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as the witness remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or with only an unimportant detail.

The rules of evidence provide that if scientific, technical, or other specialized knowledge will assist the jury to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify and state an opinion concerning such matters if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts in the case.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient knowledge, skill, experience, training, or education, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is not based upon sufficient facts or data, or that the opinion is outweighed by other evidence, or that the opinion is not the product of reliable principles and methods, or that the witness has not applied the principles and methods reliably to the facts in the case, then you may disregard the opinion entirely.

Plaintiffs have the burden of proving their claim by a preponderance of the evidence. If plaintiffs fail to do so, the jury must find against them.

A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief 'that what is sought to be proved is more likely true than not true. To establish a claim by a "preponderance of the evidence" merely means to prove that the claim is move likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all the witnesses, including deposition witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

During the trial of this case certain testimony has been introduced by way of deposition. A deposition is the sworn, recorded answers to questions asked a witness in advance of the trial. Deposition testimony can be introduced for the purpose of impeaching or discrediting a witness. If, in the deposition, the witness made any statements in conflict with testimony the witness gave in court, you may consider such conflicts and any explanation therefor in determining the witness' credibility.

As used in this charge, the term "plaintiffs means plaintiffs Karin Jacobs, Patria Jacobs, and JoeAnn Frost. The term "defendants" means defendants William K. Tapscott, Jr. and Baron & Budd, P.C. The term "*Jacobs* Litigation" means the litigation that defendants filed on behalf of plaintiffs and the estate

of Carl Bernard Jacobs in Galveston County, Texas on May 2, 1997.

As a professional corporation, Baron & Budd, P.C. may act only through natural persons as its agents or employees. In general, any agent or employee of a professional corporation may bind the professional corporation by acts and declarations made while acting within the scope of the authority delegated to the employee by the professional corporation, or within the scope of the person's duties as an employee of the professional corporation.

PLAINTIFFS' BREACH OF FIDUCIARY DUTY CLAIM

Plaintiffs allege that defendants breached their fiduciary duty to plaintiffs (1) by improperly using and exercising the powers of attorney in their employment agreements with plaintiffs so as to gain the benefit of attorney's fees and avoid the necessity and expense of a jury trial, and (2) by deliberately lying to them and telling them the entire *Jacobs* Litigation had settled, without telling them that Pittsburgh Corning Corporation had not settled. Defendants deny that they breached their fiduciary duty to plaintiffs.

Under Texas law, the relationship between an attorney and a client is a fiduciary relationship. The term "fiduciary" refers to integrity and fidelity. The attorney–client relationship is one in which the attorney is legally obligated to act toward his client in the most abundant good faith, exercising absolute perfect candor, openness, and honesty, and the absence of any concealment or deception. An attorney is not permitted to place his own personal interests, including his own financial interests, over the client's interests.

QUESTION NO. 1:

Did Baron & Budd, P .C. improperly use and exercise the powers of attorney in its employment agreements with plaintiffs so as to gain the benefit of attorney's fees and avoid the necessity and expense of a jury trial?

> Instruction: Plaintiffs have the burden of proof If they have met their burden, answer "Yes;" otherwise, answer "No."

ANSWER: NO

QUESTION NO. 2:

Did William K. Tapscott, Jr, deliberately lie to plaintiffs and tell them the entire *Jacobs* Litigation had settled, without telling them that Pittsburgh Corning Corporation had not settled?

> Instruction: Plaintiffs have the burden of proof, If they have met their burden, answer "Yes;" otherwise, answer "No."

ANSWER: Yes

If you have answered Question No. 1 or 2 "Yes," read the following instructions regarding damages and answer Question No. 3. Otherwise, proceed to the court's instructions concerning jury deliberations

DAMAGES

If plaintiffs have proved their breach of fiduciary duty claim by a preponderance of the evidence, then you must determine the damages to which they are entitled.

You should not interpret the fact that I am giving instructions about damages as an indication in any

way that I believe that plaintiffs should, or should not, win this case. It is your first task to decide whether defendants are liable, I am instructing you on damages only so that you will have guidance in the event you decide that defendants are liable and that plaintiff's are entitled to recover damages,

If you find that defendants are liable to plaintiffs, then you must determine an amount that is fair compensation for all of plaintiffs' damages. These damages are called compensatory damages The purpose of compensatory damages is to make plaintiffs whole—that is, to compensate them for the damages they prove they have suffered.

You may award compensatory damages only for injuries that plaintiffs prove were caused by defendants' alleged breach of fiduciary duty. The damages that you award must be fair compensation for all their damages, no more and no less. Compensatory damages are not allowed as a punishment and cannot be imposed or increased to penalize defendants. You should not award compensatory damages for speculative injuries, but only for those damages that plaintiffs have actually suffered.

If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that plaintiffs prove the amount of their losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

You must use sound discretion in fixing an award of damages, drawing reasonable inferences where you

find them appropriate from the facts and circumstances in evidence.

QUESTION NO. 3:

What amount of damages, if any, should be awarded to plaintiffs?

Instruction: Plaintiff's have the burden of proof, Answer in dollars and cents, if any. Do not include interest on any amount of damages you find

ANSWER: $129.000

Jury Deliberations

The fact that I have given you in this charge instructions about a particular claim, or that I have not so instructed you, should not be interpreted in any way as an indication that I believe a particular party should, or should not, win this case.

In order to return a verdict your verdict must be unanimous. It is your duty as jurors to consult one another and to deliberate with a view towards reaching an agreement. Each of you must decide the case for yourself, but only after an impartial consideration with each other of all the evidence in the case. In the course of your deliberations, do not hesitate to reexamine your own view and change your opinion if convinced it is erroneous. Do not, however, surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of other jurors or for the mere purpose of returning a verdict. Remember at all times that you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

After I finish reading this charge, you will retire to the jury room. I will send you the exhibits that have been admitted into evidence. You will first select one member of the jury to act as presiding juror. The presiding juror will preside over your deliberations and will speak on your behalf here in court.

Do not deliberate unless all members of the jury are present in the jury room, In other words, if one or more of you go to lunch together or are together outside the jury room, do not discuss the case.

When you have reached unanimous agreement as to your verdict, the presiding juror shall fill in your answers to the questions on a copy of the charge that I will provide to you for this purpose, shall date and sign the last page of that copy of the charge, and shall notify the court security officer that you have reached a verdict. The court security officer will then deliver the verdict to me.

The court will honor the schedule you set for your deliberations and your requests for breaks during your deliberations. From time to time I may communicate with you concerning your schedule. This is done primarily for the purpose of anticipating the court's staffing needs, and is not in any way intended to suggest that your deliberations should be conducted at a different pace or on a different schedule.

During the trial, the court reporter made a verbatim record of the proceedings. The court rules do not provide for testimony to be produced for the jury in written form, or for testimony to be read back to the jury as a general aid in refreshing the jurors' memories. In limited circumstances, the court may direct the court reporter to read testimony back to the jury in open court. This is done, however, only when the

jury certifies that it disagrees as to the testimony of a particular witness, and identifies the specific testimony in dispute.

If during your deliberations, you desire to communicate with me, your presiding juror will reduce your message or question to writing, sign it, and pass the note to the court security officer, who will bring it to my attention. I will then respond as promptly as possible, either in writing or by asking you to return to the courtroom so that I can address you orally. If you do send a message or ask a question in which you indicate that you are divided, never state or specify your numerical division at the time.

February 8, 2007.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

The foregoing is the unanimous verdict of the jury.

Dated: February 8 2007. /s/ [Illegible]
Presiding Juror

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:04-CV-1968-D

KARIN JACOBS, *et al.*,
Plaintiffs,

v.

WILLIAM K. TAPSCOTT, JR., *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

The question presented by defendants' renewed motion for judgment as a matter of law is whether the jury could reasonably have found that defendants—an attorney and his law firm—breached their fiduciary duties to plaintiffs by deliberately lying to them and telling them that their entire asbestos lawsuit had settled, without telling them that one defendant had not settled. Concluding that it could not, the court grants the motion and dismisses this case with prejudice.

I

The court assumes the parties' familiarity with the background facts and procedural history of this case set out in the court's prior opinion granting in part and denying in part defendants' motion for summary judgment. *Jacobs v. Tapscott*, 2006WL 2728827, at *1-*2 (N.D. Tex. Sept. 25, 2006) (Fitzwater, J.). It will

therefore summarize the background facts and procedural history as necessary to understand today's decision. The court will also discuss the pertinent evidence adduced at trial, applying the standard that governs the court's review and assessment of the trial evidence when deciding a renewed motion for judgment as a matter of law.

Plaintiffs Karin Jacobs ("Karin"), Patria Jacobs ("Patria"), and JoeAnn Frost ("JoeAnn") sued defendants William K. Tapscott, Jr. ("Tapscott"), an attorney, and Baron & Budd, P.C. ("Baron & Budd"), the law firm who employed him, based on their representation of plaintiffs in asbestos-related litigation arising from the death of Carl Bernard Jacobs ("Carl") from mesothelioma. Karin is Carl's widow, and Patria and JoeAnn are his daughters. Baron & Budd, a firm with a national reputation for handling asbestos litigation, accepted plaintiffs' case under a contingent fee arrangement. Each plaintiff signed an employment agreement and a power of attorney. *Id.* at *1. Baron & Budd filed suit on behalf of plaintiffs and Carl's estate in state court in Galveston, Texas (the "*Jacobs* Litigation") against numerous defendants ("Asbestos Defendants"). Before the June 1, 1999 trial setting of the *Jacobs* Litigation, Baron & Budd attorneys negotiated settlements with several Asbestos Defendants. Tapscott, the Case Manager for the Galveston docket, advised Karin and Patria that settlements had been reached with all the Asbestos Defendants for $2.5 million, and perhaps more.

Plaintiffs became dissatisfied with Baron & Budd's representation. *Id.* They alleged that the settlement was not for an amount they had agreed to accept when they retained the firm, and that their case was worth substantially more than what they received in settle-

ment; they were not informed of important details of the settlement, including that it would not be paid entirely in cash, a settlement had not been reached with Pittsburgh Corning Corporation ("Pittsburgh Corning"), certain defendants were in poor financial condition or bankrupt, and only a fraction of the sum that one defendant had agreed to pay was payable immediately in cash, with virtually no possibility of recovering the balance; that defendants did not obtain from the Asbestos Defendants written confirmation or evidence of the settlements and did not protect plaintiffs from the consequences of post-settlement bankruptcies; and that defendants had renegotiated the settlement with one defendant, substantially reducing the payment. *Id.* Plaintiffs sued Tapscott and Baron & Budd on theories of negligence, misrepresentation, breach of fiduciary duty, breach of contract, fee forfeiture, and gross negligence. *Id.* at *2.

Tapscott and Baron & Budd moved for summary judgment. The court granted the motion in large part, but it denied it as to two components of plaintiffs' breach of fiduciary duty claim. It concluded that defendants were not entitled to summary judgment dismissing the claim that defendants had improperly used and exercised the powers of attorney in the employment agreements with plaintiffs so as to improperly gain the benefit of attorney's fees and avoid the necessity and expense of a jury trial. *Id.* at *7. And, as pertinent here, the court held that defendants were not entitled to summary judgment dismissing the claim that they had breached their fiduciary duties by deliberately lying to plaintiffs and telling them that the entire *Jacobs* Litigation had settled, without telling them that Pittsburgh Corning had not settled. *Id.*

Defendants moved for summary judgment dismissing plaintiffs' breach of fiduciary duty claim on the ground that it was improperly fractured. *Id.* at *5. In response to defendants' motion, plaintiffs identified 13 grounds for their breach of fiduciary duty claim, one of which—ground 7—was that defendants breached their fiduciary duty by "deliberately lying to plaintiffs and informing them that the entire *Jacobs* Litigation had settled, without telling them that Pittsburgh Corning had not settled." *Id.* The court denied defendants' motion, concluding that this ground was not fractured.

> In ground 7, plaintiffs allege that defendants deliberately lied to them and told them the entire *Jacobs* Litigation had settled, without telling them that Pittsburgh Corning had not settled. The attorney-client relationship is highly fiduciary in nature. This relationship carries the utmost good faith. Attorneys owe their clients a fiduciary duty of most abundant good faith, requiring absolute perfect candor, openness, and honesty, and the absence of any concealment or deception. This predicate for breach of fiduciary duty—an alleged deliberate lie rather than a mere failure to communicate or inform—is not improperly fractured.

Id. at *6 (citations and quotation marks omitted).

The court also noted that, in their reply brief, defendants challenged this claim on additional grounds. *Id.* at *7. They argued, *inter alia*, that Tapscott announced the settlement based on advice from a person who handled settlements with Pittsburgh Corning and confirmed the settlement, but Pittsburgh Corning's counsel backed out of the settlement. *Id.* The court declined to consider this or defendants' other

grounds for granting summary judgment because when they "moved for summary judgment with respect to plaintiffs' breach of fiduciary duty claim, they did so only on the basis of claim fracturing," "[i]t is error to grant summary judgment on a ground not raised," "[a]nd the court will not consider an argument raised for the first time in a reply brief." *Id.* In other words, the court did not reach the merits of defendants' contention that Tapscott could not have deliberately lied when he informed plaintiffs that the case had settled because, when he announced the settlement, he was doing so based on advice that Pittsburgh Corning had settled, but Pittsburgh Corning's counsel later backed out.

The parties tried these two remaining breach of fiduciary duty claims to a jury. The jury found in favor of defendants on the claim that they had breached their fiduciary duties by improperly using the powers of attorney. It found in plaintiffs' favor on the claim that Tapscott deliberately lied by telling plaintiffs the entire *Jacobs* Litigation had settled, without telling them that Pittsburgh Corning had not settled.[1]

At each appropriate procedural stage during the trial, defendants moved for judgment as a matter of

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[1] In their briefing and at the oral argument of this motion, defendants have treated this claim as if asserted against Tapscott alone. The court disagrees. Although the question the court asked of the jury in its charge was framed specifically in terms of whether Tapscott deliberately lied, this was because it was his conduct that was at issue. The claim, however, was asserted against both defendants. As the court notes above, "[i]n ground 7 [of their summary judgment response], plaintiffs allege[d] that defendants deliberately lied to them and told them the entire *Jacobs* Litigation had settled, without telling them that Pittsburgh Corning had not settled." *Jacobs*, 2006 WL 2728827, at *6 (emphasis added).

law.[2] They maintained, in pertinent part, that apart from plaintiffs' conclusory statements, which were not evidence, there was no competent evidence that Tapscott deliberately lied. Ds. Mot. J. Matter of Law 2. Defendants asserted:

> There is not a scintilla of evidence that when Tapscott announced the settlement to Plaintiffs[,] Pittsburgh Corning had not agreed to settle or, more importantly, that Tapscott actually knew a settlement had not occurred. The undisputed evidence is that Tapscott learned after he announced the settlement to Plaintiffs that Pittsburgh Corning "pulled" its offer, or reneged on the settlement.

Id. (emphasis in original). Defendants also argued that 'there must be some evidence that Tapscott had actual knowledge that Pittsburgh Corning had not settled when he told Plaintiffs the entire case was settled." *Id.* The court denied the motions without. prejudice.[3]

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[2] *Cf., e.g., Flowers v. S. Reg'l Physician Servs, Inc.*, 247 F.3d 229, 238 (5th Cir. 2001) (holding that if party fails to move for judgment as a matter of law under Fed. R. Civ. P. 50(a) on an issue at the conclusion of all the evidence, it waives both right to file renewed post-verdict Rule 50(b) motion and also right to challenge sufficiency of evidence on that issue on appeal).

[3] During the oral argument of this motion, defendants asserted that this case should never have gone to the jury. Although the court's decision today confirms that this contention is correct as it relates to the claim at issue, it should be noted that the court conformed to the preferred approach in this circuit when it submitted the claim to the jury and effectively reserved its ruling.

> We remind the district court that the better practice would have been to reserve ruling on the motion for a

After the jury returned a verdict, the court advised counsel that it would consider the motion on post-trial briefing and defer entry of judgment. *See* Fed. R. Civ. P. 50(b) ("If the court does not grant a motion for judgment as a matter of law made under subdivision (a), the court is considered to have submitted the action to the jury subject to the court's late deciding the legal questions raised by the motion."). The parties have submitted additional briefing, and the court has heard oral argument.

II

A motion for judgment as a matter of law "challenges the legal sufficiency of the evidence to support the verdict." *Hodges v. Mack Trucks, Inc.*, 474 F.3d 188, 195 (5th Cir. 2006) (citing *Ford v. Cimarron Ins. Co.*, 230 F.3d 828, 830 (5th Cis. 2000)).

> Judgment as a matter of law is appropriate with respect to an issue if there is no legally sufficient evidentiary basis for a reasonable jury to find for

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directed verdict and let the case go to the jury. "The primary reason we encourage district courts to reserve judgment on motions for directed verdict is that if the court grants a judgment n.o.v., a retrial is avoided if we reverse the j.n.o.v. because there is a jury verdict that can be reinstated." *McPhillamy v. Brown & Root, Inc.*, 810 F.2d 529, 533 (5th Cir. 1987): "At least nine other Circuits have endorsed this practice." *Id. See, e.g., Holmgren v. Massey-Ferguson, Inc.*, 516 F.2d 856, 859 n.2 (8th Cir. 1975) ("Once again we emphasize the wisdom and expediency of reserving a ruling on such motions [for directed verdicts] until the jury has had the opportunity to weigh the evidence.").

Wiltz v. Mobil Oil Exploration & Producing N. Am., Inc., 938 F.2d 47, 50 (5th Cir. 1991) (brackets in original) (addressing motion for directed verdict, now referred to as motion for judgment as a matter of law).

> a party on that issue. This occurs when the facts and inferences point so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary verdict. In considering a Rule 50 motion, the court must review all of the evidence in the record, drawing all reasonable inferences in favor of the nonmoving party; the court may not make credibility determinations or weigh the evidence, as those are jury functions. In reviewing the record as a whole, the court must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.

Brennan's Inc, v. Dickie Brennan & Co., 376 F.3d 356, 362 (5th Cir. 2004) (citations, brackets, and quotation marks omitted). The "standard of review with respect to a jury verdict is especially deferential." *Lubke v. City of Arlington*, 455 F.3d 489, 494 (5th Cir. 2006) (quoting *Brown v. Bryan County, Okla.*, 219 F.3d 450, 456 (5th Cir. 2000)). "A jury verdict must stand unless there is a lack of substantial evidence, in the light most favorable to the successful party, to support the verdict." *Am. Home Assurance Co. v. United Space Alliance, LLC*, 378 F.3d 482, 487 (5th Cir. 2004) (citing *Liberty Mut. Ins, Co. v. Falgoust*, 386 F.2d 248, 253 (5th Cir. 1967)).

III

At the post-verdict stage, plaintiffs' remaining claim is based on the following two premises: First, Tapscott deliberately lied to them and told them the entire

Jacobs Litigation had settled, without telling them that Pittsburgh Corning had not settled. Second, Tapscott deliberately lied to plaintiffs by telling them the entire case had settled and then concealing from them the fact that the Pittsburgh Corning settlement had been pulled, or failing to correct what he may have believed to be a truthful statement when he told plaintiffs that the entire case had settled. For reasons the court will explain, the evidence is legally insufficient to support the first ground, and the second exceeds the scope of the claim that survived summary judgment.

A

The following recitation of the evidence is based on the court's review of all of the evidence in the record. The court has drawn all reasonable inferences in plaintiffs' favor, has not made credibility determinations, and has not weighed the evidence. In reviewing the record as a whole, the court has disregarded all evidence favorable to defendants that the jury was not required to believe. It has given credence to the evidence that favors plaintiffs and that supports defendants and is uncontradicted and unimpeached.[4]

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[4] For example, during closing argument, plaintiffs' counsel repeatedly acknowledged the credibility and reliability of the testimony of Christina Mancuso ("Mancuso"), a Baron & Budd attorney. *See, e.g.*, Tr. 4:66 (applauding Mancuso for testifying that she told Tapscott the case had not settled); 4:68 (asserting that Mancuso had no reason to lie during her testimony); 4:71 (relying on Mancuso's testimony regarding what everyone who should have known about the Pittsburgh Corning settlement did know); 4:75 (asserting that Mancuso was credible and believable when she testified that she told Tapscott on June 2, 1999 that the case had not settled) & 4:76 (relying on the direct evidence of what Mancuso said). Except as noted, *see infra* at note 6, the court has generally treated her testimony that supports defendants as uncontradicted and unimpeached.

Baron & Budd is a law firm that, at the time of the *Jacobs* Litigation, had developed a reputation for competence in representing individuals who had been exposed to and injured by asbestos products and had developed diseases like mesothelioma. Tr. 4:5-6.[5] It allocated responsibilities for litigating asbestos cases among several lawyers with varying duties. *Id.* at 3:192-93 & 4:8-10. Tapscott was the Case Manager for suits pending in Galveston County, Texas, and therefore was the Case Manager for the *Jacobs* Litigation. *Id.* at 2:129. As Case Manager, Tapscott was responsible for the case and for communicating with the clients. *Id.* at 2:139 & 2:146. Another attorney, Rick Nemeroff ("Nemeroff"), was the lawyer who would have represented plaintiffs had the case been tried. *Id.* at 2:138. Baron & Budd sued numerous Asbestos Defendants on plaintiffs' behalf, including Pittsburgh Corning. *Id.* at 2:170 & 2:171. Christina Mancuso ("Mancuso") was the Baron & Budd attorney who had responsibility for negotiating settlements with Pittsburgh Corning. *Id.* at 2:76.

Baron & Budd settled asbestos cases like the *Jacobs* Litigation using the following procedure. A lawyer such as Mancuso was assigned to one or more defendants and negotiated a settlement with a specific defendant based on authority that the client had given Baron & Budd beforehand. *Id.* at 2:86-87. The firm attorney who negotiated the settlement did not contact the client in advance for specific approval of the settlement amount being negotiated. *Id.* After a settlement was reached between the Baron & Budd attorney and the defe. dant's counsel, the Baron & Budd negotiating attorney relayed the information to

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[5] Citations to "Tr." are to the volume and page of the trial transcript.

the Case Manager, who was responsible for communicating with the client. *Id*, at 2:91. Baron & Budd then sent the client a release and a cover letter advising her that the defendant had made a settlement offer. *Id.* at 2:95. The letter did not state that a settlement had already been reached. *Id.* at 2:97. The correspondence informed the client that she could accept or reject the settlement and could call the firm with any questions. *Id.* at 2:90. Baron & Budd did not provide clients with copies of letters it sent to defendants confirming the settlement amounts. *E.g.*, *id.* at 2:93. If the client did not want to accept the settlement, she would inform Baron & Budd. *Id.* at 2:94. Baron & Budd would then notify the defendant and go from there. *Id.*

Baron & Budd had several clients with suits pending against Pittsburgh Corning that were set for trial in various venues on June 1, 1999. *See* Ps. Ex. ("PX") 44. The *Jacobs* Litigation was scheduled for trial on that date in Galveston. *E.g.*, *id.* Baron & Budd classified defendants according to settlement type. Pittsburgh Corning was considered to be in the "trial" class, meaning it was a large company that fought everything and would not settle unless the case was set for trial and the parties were at the courthouse door. Tr. 2:78.

Mancuso negotiated settlements of Pittsburgh Corning cases with Cathy Mohan ("Mohan"), an attorney who represented Pittsburgh Corning. *See* PX 44. Mancuso knew that the *Jacobs* Litigation was set for trial on June 1 in Galveston. Tr. 2:83 & 2:107. On June 1 Mancuso and Mohan spoke by telephone and settled plaintiffs' case for $225,000. *See id.* at 2:82-83. She or a paralegal inserted this amount into the Baron & Budd computer. *Id.* at 2:101. Based on the Pittsburgh Coining settlement and all the other offers

that had been made in the case, Mancuso believed the entire case had been settled. *Id.* at 2:107. When Tapscott was notified that Pittsburgh Corning had offered $225,000, he believed the lawsuit was completely settled. *Id.* at 2:170.

Under Baron & Budd policy, Mancuso was to reach a settlement and relay the information to the Case Manager, who in turn was to inform the client. *Id.* at 2:93, 2:98 & 2:100. She reached a settlement and relayed the information to Tapscott. *Id.* at 2:119 & 2:121. Based on her understanding at the time, she told Tapscott that Pittsburgh Corning had agreed to pay $225,000. *Id.* at 2:107. No one knew on June 1 that Pittsburgh Corning was going to pull the offer on June 2, 1999. *Id.* at 2:112.[6]

Tapscott does not know whether he was in Galveston for the June 1, 1999 trial setting and does not have a specific memory of being there. *Id.* at 2:135 & 2:139. He has no specific recollection because he traveled to Galveston more than 150 times during the last ten years at Baron & Budd. *Id.* at 2:135. Tapscott has not reviewed PX 85, the Baron & Budd expense records for the *Jacobs* Litigation, to determine whether there were expenses that indicate he had gone to Galveston for trial on June 1 or sometime immediately thereafter. *Id.* at 2:136-37. He has not looked at any records to allow him to better determine whether he

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[6] Mancuso testified that she did not believe that Tapscott lied when he told plaintiffs that the entire case had settled. Tr. 2:112. Although, as the court notes *supra* at note 4, plaintiffs generally acknowledged the credibility and reliability of Mancuso' s testimony, they impeached this testimony on the basis that she did not have personal knowledge of what Tapscott said to plaintiffs. *Id.* Accordingly, the court has not accepted this evidence as uncontradicted and unimpeached and has not considered it in deciding defendants' motion.

was there for the trial setting. *Id.* at 2:137. Tapscott does not remember specifically whether Nemeroff went to Galveston for the trial setting. *Id.* at 2:139. He has no expense statement that shows he went to Galveston. *Id.* at 2:140.

On June 2, 1999 Mancuso wrote Mohan a letter confirming the settlements that had been reached in several cases. The letter included a reference to the settlement for $225,000 of the *Jacobs* Litigation. *Id.* at 2:77 & 85; PX 44. Mancuso thought the case had settled, because she sent Mohan a letter attempting to confirm the offer. *Id.* at 2:100. On that same day, however, probably during the morning, Mohan called Mancuso and told her she was pulling the settlement offer because the case had not been resolved as to all defendants. *Id.* at 2:84-86 & 2:101. Pittsburgh Corning only settled cases that were called to trial and that were resolved as to all defendants and plaintiffs' case had been continued. *Id.* at 2:84-86 & 2:108.[7]

As soon as she found this out from Mohan, Mancuso relayed to Tapscott by telephone the fact that the offer had been pulled because the case had not been resolved as to all defendants. *Id.* at 2:101-02, 2:103 & 2:119. Tapscott does not remember receiving a call from Mancuso on June 2 or obtaining that information on that date, although he does not dispute Mancuso's testimony. *Id.* at 2:140-41 & 2:143.

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[7] The evidence is undisputed that the state court in Galveston denied a motion for continuance in the *Jacobs* Litigation and that the docket sheet does not reflect that the case was announced settled. Tr. 2:84-85 & 113-15; DX20. The court has assumed in deciding this motion that the jury could reasonably have found that a motion to continue the case was denied and that no announcement was made to the state court that the case had settled. Even so, this does not alter the court's decision.

On June 2 Tapscott called Karin and told her that Baron & Budd had won her lawsuit for $2.5 million, even more. *Id.* at 1:134.[8] He said the entire case had settled. *Id.* at 1:219 & 2:146. Tapscott did not mention Pittsburgh Corning when he spoke to her and did not tell her how much it had agreed to pay. *Id.* at 1:140-41, 1:147 & 2:147. He did not specifically say anything about Pittsburgh Corning's not agreeing to settle the case. *Id.* at 1:147. Karin was never told that the settlement was for anything other than cash. *Id.* at 1:144-45 & 1:191. After the call from Tapscott, she did not hear from him again. *Id.* at 1:135 & 1:160. No one at Baron & Budd, including Tapscott, ever told Karin that the sum of $225,000 was not agreed to and would not be paid before the end of 1999. *Id.* at 1:189.

Karin immediately called Patria to tell her she had just heard from Tapscott, that the amount of the settlement was $2.5 million, and that she thought it was great to find out that the case had settled. *Id.* at 1:134 & 2:225. Patria testified that she did not know the exact date when Tapscott called Karin, *id.* at 3:10-11, but the call came sometime in early June, right around Memorial Day weekend, on the same

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[8] Patria testified at one point that Tapscott spoke to her on June 1, 1999. Tr. 3:10. Although if true this evidence would defeat plaintiffs' claim that Tapscott deliberately lied—because Pittsburgh Corning did not pull the settlement until the following day—the court must draw all reasonable inferences in plaintiffs' favor and give credence to the evidence that favors plaintiffs. There is other evidence that favors plaintiffs. There is other evidence that Tapscott spoke to Karin and Patria on June 2, and Patria also testified that she did not know if Tapscott called Karin on June 1. *Id.* Accordingly, for purposes of this decision, the court assumes that June 2, 1999 is the date on which Tapscott spoke to Karin and Patria.

date that Patria called Tapscott back, *id.* at 2:225 & 3:10-11. Because Patria did not believe Karin,[9] she asked for Tapscott's cell phone number and spoke to him directly. *Id.* at 2:225. Tapscott told Patria the same thing he had relayed to Karin: it was great news, the case had settled for $2.5 million, but they would probably get more, and plaintiffs did not have to come to Galveston for trial because all the companies had settled. *Id.* at 2:225-26. Tapscott did not discuss individual defendants with her or tell her what Pittsburgh Corning had agreed to pay. *Id.* at 2:226.

The Baron & Budd expense records for the *Jacobs* Litigation show that Scott Morrison ("Morrison") flew to and from Houston on June 7, 1999. PX 85. Morrison is a Case Manager who takes depositions. Tr. 2:117. The travel expense form reflects travel dates of June 6 and 7. *Id.* at 2:118; PX 85.

JoeAnn wrote a letter to Tapscott dated June 14, 1999 that referred to the entire case' s being settled. Tr. 2:164; PX 47. By that date it was clear to the clients that the case had been fully settled. Tr. 2:164. None of Tapscott's handwritten notes on the letter indicates that he had notified her that Pittsburgh Corning had not settled. *Id.* at 2:165.

On August 2, 1999 the *Jacobs* Litigation was reset for trial in November 1999. *Id.* at 2:123-24; DX20. In connection with that setting, Mancuso and Mohan negotiated a settlement for $215,000. *Id.* at 2:109 & 2:120. The agreed judgment filed in January 2000 required that Pittsburgh Corning make the payment

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[9] Patria did not suggest that she questioned Karin's credibility. She indicated that she wanted to get the information about the settlement "straight from the horse's mouth." Tr. 2:225.

by August 2000. *Id.* at 2:120. Pittsburgh Corning filed for bankruptcy in April 2000, however, so plaintiffs did not recover the entire negotiated amount. *Id.* at 1:180 & 2:109.

B

The court concludes that the evidence is legally insufficient for a reasonable jury to have found that Tapscott deliberately lied to plaintiffs and told them the entire *Jacobs* Litigation had settled, without telling them that Pittsburgh Corning had not settled. The jury could reasonably have found that Mancuso and Mohan reached a settlement of plaintiffs' claims against Pittsburgh Corning on June 1, 1999 for the sum of $225,000; that Tapscott did not announce the settlement to the state court in Galveston; that on June 1 the state court denied a motion to continue the trial of the Jacobs Litigation; and that the entire case did not go to trial at that time, causing Pittsburgh Corning to pull its settlement. It could also have reasonably found that, without disclosing that Pittsburgh Corning had not settled, Tapscott told Karin and Patria on June 2, 1999 that plaintiffs had won their lawsuit for $2.5 million, even more, that the entire case had settled, and that they did not need to come to Galveston, and that Tapscott was not in Galveston when he communicated with Karin[10]

[10] Karin testified that Tapscott called her from the steps of the Galveston courthouse. Tr. 1:134. She did not state that Tapscott told her he was on the courthouse steps at the time of the call, or how she knew where he was. Even if the evidence is sufficient for the jury to have reasonably found that Tapscott misrepresented to Karin that he was on the courthouse steps at the time of the call, this is not the basis for plaintiffs' breach of fiduciary duty claim, and it does not make legally sufficient the evidence that the court holds is legally insufficient to support the verdict.

and Patria. The jury could likewise have reasonably found that, probably during the morning of June 2, 1999, and as soon as Mancuso learned from Mohan that Pittsburgh Corning had pulled the settlement, Mancuso notified Tapscott. And it could reasonably have found that on June 6 and 7, Baron & Budd attorney Morrison was working on the *Jacobs* Litigation, and that in response to a June 14, 1999 letter from JoeAnn, Tapscott failed to tell her that Pittsburgh Corning had not settled. But the evidence is legally insufficient for a reasonable jury to have found that when Tapscott spoke to Karin and Patria, he already knew that Pittsburgh Corning had pulled the settlement and therefore deliberately lied by telling them the entire case had settled, without disclosing that Pittsburgh Corning had not settled.

As noted *supra* at § I, defendants moved for judgment as a matter of law on the ground that the record lacked a scintilla of evidence that when Tapscott announced the settlement to plaintiffs, he actually knew that the settlement with Pittsburgh Corning had not occurred. They maintained that the evidence was undisputed that Tapscott learned *after* he announced the settlement to plaintiffs that Pittsburgh Corning had pulled its offer or reneged on the settlement. And they challenged whether the record contained some evidence that Tapscott had actual knowledge that Pittsburgh Corning had not settled when he told plaintiffs the entire case was settled. In order for the jury to have reasonably found that when Tapscott spoke to Karin and Patria, he already knew that Pittsburgh Corning had pulled the settlement, there must have been sufficient evidence for the jury to have found that Tapscott told Karin and Patria of the settlement after the point in time on June 2, 1999 when Mancuso informed him that the settlement had been pulled.

But the trial record is devoid of substantial evidence that this occurred.

Mancuso and Tapscott both believed on June 1 that the entire case had settled. Mohan pulled the Pittsburgh Corning settlement on June 2. Mancuso thought it probable that she spoke to Mohan the morning of June 2 and that she called Tapscott as soon as she found out. Mancuso also testified that she prepared PX 44—the letter to Mohan that confirmed several Pittsburgh Corning settlements, including the $225,000 settlement in the *Jacobs* Litigation—on June 2. She had to have had time to arrive at her office and prepare and sign the letter before Mohan called her, because the letter assumed that the *Jacobs* Litigation had been settled.[11] Neither Karin nor Patria testified regarding *when* on June 2 Tapscott spoke to them, except to say that Karin's call to Patria came immediately after Karin spoke to Tapscott, and that Patria called Tapscott the same day *See* Tr. 1:134 (Karin testified that she "immediately" called Patria after she spoke with Tapscott); *id.* at 2:225 (Patria testified that when Karin called her, she said she had "just heard" from Tapscott); and *id.* at 3:11 (Patria testified that the call from Karin came on the same day Patria called Tapscott). Patria did not specifically testify, however, to facts that would support the reasonable inference that there was any significant time lapse between her conversation with Karin and her call to Tapscott. See *id.* at 2:225 & 3:11. And there is

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[11] Although the following observation has not affected the court's reasoning—i.e., the court has not weighed the evidence—it is possible that Mancuso prepared the letter herself. There are no initials that indicate the letter was dictated to, or typed by, a secretary, and Mancuso's surname is misspelled in the signature block.

no other evidence in the record that would have allowed the jury to find circumstantially that Tapscott already knew about the failed settlement when he talked to Karin and Patria. The jury was left to speculate or engage in conjecture concerning when Tapscott spoke to Karin and Patria. This is insufficient as a matter of law to support the verdict.

> Because of the requirement that the verdict be supported by substantial evidence, a verdict may not rest on speculation and conjecture. Similarly, the jury's freedom to draw inferences from the evidence does not extend so far as to allow a wholly unreasonable inference or one which amounts to mere speculation and conjecture.

Nichols Constr. Corp. v. Cessna Aircraft Co., 808 F.2d 340, 346-47 (5th Cir. 1985) (emphasis in original) (footnotes, citations, and quotation marks omitted).[12]

Plaintiffs argue in their brief that Tapscott did not review the Baron & Budd case file and therefore could not identify any expense item that established "when he communicated with the Plaintiffs about the case." Ps. Br. 4. They assert that Tapscott was unable

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[12] As reflected in one of the questions that plaintiffs' counsel asked defendants' expert witness, plaintiffs recognized that the sequence of when Tapscott learned that the settlement had failed and of when he spoke to Karin and Patria was "very important." Tr. 3:236. Yet as revealed in another question that plaintiffs' counsel posed to the expert, the proof was insufficient to permit a reasonable jury to find that Tapscott spoke to Karin and Patria after he learned that the settlement had been pulled.

> All right. Now, we also don't know, apart from what my clients said they thought the date was, we don't actually know the date that Mr. Tapscott placed that call from a place he couldn't recall where he was situated.

Id. at 3:224 (emphasis added).

to testify about "the specific date(s) that he spoke with the Plaintiffs and informed them that their entire case had settled." *Id.* And they maintain that Tapscott and the Baron & Budd witnesses "had no specific recollection of or documents reflecting when the Plaintiffs[ ] were telephoned about the settlement of the entire case." *Id.* In closing argument, their counsel urged that defendants' witnesses had failed to use available opportunities to review the relevant documents to see whether they could "better clarify" when Tapscott "actually made the phone call, when he actually contacted Karin Jacobs or when he got the call from Patria Jacobs." Tr. 4:92. But this was not defendants' obligation. It was plaintiffs' burden to prove, at least by circumstantial evidence, that Tapscott spoke to them after Mancuso had already informed him that Pittsburgh Corning's attorney had pulled the settlement.

Plaintiffs also maintain that it is evidence of a deliberate lie that, on being informed by Mancuso that Pittsburgh Corning had not settled, Tapscott did not immediately correct what he may have believed to be a truthful statement when he told plaintiffs that the entire case had settled. First, this argument undercuts plaintiffs' theory that Tapscott already knew about the aborted settlement when he spoke to Karin and Patria. Second, this is a concealment claim, which the court rejects for reasons explained below. The argument rests on the premise that, although Tapscott may not have deliberately lied at the time he spoke to Karin and Patria, he did so by concealing the fact that the settlement with Pittsburgh Corning had fallen through.

Nor is Karin's testimony that Tapscott lied to her adequate to provide legally sufficient evidence (al-

though plaintiffs do not rely on it in their brief). Karin testified that when Tapscott talked to her and told her the entire case had settled, he was not truthful, she was deliberately lied to, and he (and her lawyers) had lied. Tr. 1:190, 1:214 & 1:219. This evidence is legally insufficient to support the verdict because Karin was not testifying based on personal knowledge of what Tapscott knew at the time he was speaking with her. Her testimony that he lied was based on information she said she learned after the fact, such as in documents obtained later. *Id*, at 1:190. Her testimony that Tapscott lied is insufficient of itself to support the verdict, because it is not based on her personal knowledge of what Tapscott knew when he spoke to her on June 2, 1999.[13]

The evidence that Baron & Budd attorney Morrison was in Houston on June 6 and 7, 1999, and that his expenses were charged to the *Jacobs* Litigation, would permit the jury to find that the entire case was not settled as of June 2 and that Morrison was working on the case after Tapscott informed plaintiffs that the entire case had settled. But it would not permit the jury to have reasonably found that Tapscott knew when he spoke to Karin and Patria that the entire case had not settled. Morrison's work on these dates is fully consistent with the premise that Tapscott informed Karin and Patria of the settlement sometime on June 2—but before Mancuso called him—and that work began anew on the case once it was learned that the Pittsburgh Corning settlement had been pulled.

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[13] Patria and JoeAnn also offered subjective testimony that they believed Baron & Budd and Tapscott had lied. *See, e.g.*, Tr. 3:5 & 3:39-40. This evidence is legally insufficient for the same reasons.

Nor is Tapscott's handwritten note on PX 47 sufficient evidence of a deliberate lie. It is undisputed that JoeAnn wrote a letter dated June 14, 1999 to Tapscott that referred in the second paragraph to the entire case's being settled, and that Tapscott handwrote a response that addressed the time-frame when plaintiffs could anticipate-receipt of payments. Tr. 2:164; PX 47. Plaintiffs contend in their brief that Tapscott informed JoeAnn that the case had settled, without mentioning that Pittsburgh Corning had not settled. During closing argument, plaintiffs' counsel asserted that, in Tapscott's handwritten response, he "affirmatively represent[ed] that the case was settled." Tr. 4:93. But Tapscott did not affirmatively represent in his handwritten response that the entire case had settled. He responded specifically to the fifth paragraph of JoeAnn's letter (concerning her stated understanding that the remaining settlement funds typically took 30-60 days to disburse), not to the second (in which JoeAnn thanked him for calling and telling her that all defendants had settled).[14] And while Tapscott did not disclose that the entire case had not settled, or that the Pittsburgh Corning settlement had fallen through, as the court explains below at § IV, plaintiffs did not preserve a concealment claim for trial.

In their brief, plaintiffs also contend that a February 7, 2000 letter from Tapscott to Patria, DX 140, in which he enclosed Baron & Budd computer records that continued to show the case had settled

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[14] For the same reason, plaintiffs' similar assertion in their brief is misplaced. See Ps. Br. 10 (asserting that "[Tapscott] wrote to Plaintiff JoeAnn on June 14, 1999 informing in his own handwriting that the case had settled without mention that [Pittsburgh Corning] had not settled . . ." (footnote omitted)).

on June 1, 1999, establish that Tapscott and Baron & Budd perpetrated a deliberate lie and/or omission. The court holds that this evidence is insufficient, alone or in combination with other proof, to support the verdict. First, this document was sent to Patria and the other plaintiffs well after the events of June 2, 1999. Second, the fact that Baron & Budd's internal computer records continued to reflect a June 1, 1999 settlement date would merely tend to corroborate defendants' position that, on that date, Mancuso and Tapscott thought the entire case had settled, not that Tapscott deliberately lied to plaintiffs. Third, as plaintiffs recognize, the computer records also reflected that the settlement was for $215,000. Tr. 3:176; DX 140. Other trial evidence established that Mancuso and Mohan negotiated a settlement for $215,000 in advance of the November 1999 trial setting. Tr. at 2:108-09 & 3:176. Therefore, the June 1, 1999 settlement date had no direct relationship to the amount of the settlement shown. The jury could not have reasonably found that internal computer records, disclosed to plaintiffs eight months after Tapscott made the representations in question, that contained multiple errors, corroborated an intent by Tapscott to lie about the settlement reached on June 1, 1999 and abrogated the next day. Nor can plaintiffs rely on these records as proof of an omission—*i.e.*, a failure to correct a misrepresentation--because this is not a concealment case.

Accordingly, the court holds that the evidence adduced at trial, viewed under the controlling Rule 50(b) standard, is legally insufficient to support the verdict.

IV

Plaintiffs' second basis for establishing breach of fiduciary duty is that Tapscott deliberately lied to plaintiffs by telling them the entire case had settled and then concealing from them the fact that the Pittsburgh Corning settlement had been pulled, or failing to correct what he may have believed to be a truthful statement when he told plaintiffs that the entire case had settled.

A

At trial, plaintiffs' counsel asserted during closing argument that Tapscott deliberately lied by not correcting something he had already told plaintiffs, Tr. 4:72; concealing the fact that the case had been reset to November, *id.* at 4:75-76; deliberately withholding information either by saying a deliberate lie or deliberately concealing the information, *id.* at 4:93; and deliberately leaving out the information Mancuso gave him when he communicated in writing with JoeAnn in response to her June 14, 1999 letter, *id.* at 4:93-94. In their brief, plaintiffs argue that once the information that Tapscott conveyed to plaintiffs was determined to be wrong, he had a duty to correct it immediately. And during oral argument of defendants' motion, plaintiffs' counsel maintained that this is a concealment case.

B

The court holds that plaintiffs' second ground exceeds the scope of the claim that survived summary judgment. Although plaintiffs' claim has a concealment component—that Tapscott did not tell plaintiffs that Pittsburgh Corning had not settled—it functioned as the predicate for the assertion that he had deliberately lied by telling them the entire *Jacobs*

Litigation had settled. In other words, the reason the statement that the entire *Jacobs* Litigation had settled was a deliberate lie was because Pittsburgh Corning had not settled. This is distinct, however, from a claim that Tapscott breached his fiduciary duty by *concealing* the truth from plaintiffs once he learned from Mancuso that Pittsburgh Corning had pulled the settlement. And plaintiffs did not preserve a concealment claim for trial.

Defendants moved for summary judgment as to all of plaintiffs' claims. The two breach of fiduciary duty claims that were tried to the jury were the ones that survived summary judgment. In response to defendants' summary judgment motion, plaintiffs made the following pertinent assertion that the court in its opinion categorized as ground 7:

> The Defendants breached their fiduciary duty to the Plaintiffs by deliberately lying to them and informing them that the entire case had settled in Galveston County, Texas when in fact it had not entirely settled and failed to inform the Plaintiffs that Pittsburg[h] Corning Corporation had not settled.

Ps. July 31, 2006 Br. 20 (footnote omitted). In support of this contention, plaintiffs cited three passages from Tapscott's deposition. *Id.* at 20 n.38 (citing Ps. App. 57). This testimony all pertained to Tapscott's recollection that he had told the state court that the entire case had settled, his belief at the time that the entire case had settled (and that he would not have made the report had it not), and that if he called plaintiffs to tell them the case had settled, he obtained his information from other Baron & Budd attorneys who had responsibility for settling with those defendants. Ps. App. 57.

Earlier in plaintiffs' brief, in the 'Factual Background" portion, they made the following assertion that is related to this claim:

> Tapscott informed the Plaintiffs that their case had been settled as a result of the June 1, 1999 trial setting for $2,400,000.00 to $2,500,000.00 and perhaps more. How much more, if any was not communicated to the Plaintiffs by the Defendants[.] At the time settlement was announced to the Plaintiffs nothing was done by the Defendants to determine the financial condition of Pittsburgh Corning Corporation in June or November 1999 or whether any of the settling defendants needed a pay out arrangement or to obtain proof of funds.

Ps. July 31, 2006 Br. 10 (footnotes omitted). In support of this assertion, plaintiffs cited three passages from Tapscott's deposition. Id. at 10 nn. 21 & 22 (citing Ps. App. 56, 63 & 76). According to this testimony, Tapscott recalled telling Karin that the case was settled, that he could not specifically recall calling JoeAnn before June 14, 1999 to tell her the case had settled, or having a specific conversation with JoeAnn, and that he did not know Pittsburgh Corning's financial condition in June or November 1999.

It is therefore clear that plaintiffs' breach of fiduciary claim based on Tapscott's allegedly deliberate lie did not encompass the concealment claim on which they now rely to uphold the verdict.

C

Defendants preserved in the Joint Pretrial Order the contention that only two assertions for plaintiffs' breach of fiduciary duty claim survived summary judgment See Jan. 31, 2007 Jt. Final Pre-Trial Order

¶ A(2). They contended, *inter alia*, that the claim at issue here was limited in scope as follows: "Tapscott deliberately lied to Plaintiffs in June 1999 about the entire Jacobs case settling and a settlement being reached with Pittsburgh Corning." *Id.* And they objected to any claims based on failure to communicate or inform, as opposed to deliberate lying. *Id.* Moreover, the claims that plaintiffs listed in the Joint Pretrial Order do not support the concealment claim that plaintiffs now assert. *See id.* at ¶ A(1)(j)-(s). And their statement of contested issues of fact plainly eliminates any concealment claim. *See id.* at ¶ C(2)-(3).[15]

"'Once the [pretrial] order is entered, it controls the scope and course of the trial.'" *Valley Ranch Dev. Co. v. Fed. Deposit Ins. Corp.*, 960 F.2d 550, 554 (5th Cir. 1992) (brackets in original) (citing Rule 16). "If a claim or issue is omitted from the order, it is waived." *Id.* (quoting (quoting *Flannery v. Carroll*, 676 F.2d 126, 129 (5th Cir. 1982)). Under the Joint Pretrial Order, any concealment-based claim that plaintiffs seek to litigate is precluded.

D

Finally, the court at the pretrial conference and during the charge conference rejected plaintiffs' at-

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[15] Plaintiffs' pertinent contested issues of fact state:

> 2. Did the Defendants misrepresent in June 1999 to Plaintiffs the extent of and amount of the settlement with each of the parties including Pittsburgh Corning Corporation?
>
> 3. Did the Defendants deliberately lie in June 1999 to Plaintiffs the extent of and amount of the settlement with each of the parties including Pittsburgh Corning Corporation?

Jan. 31, 2007 Jt. Final Pre-Trial Order ¶ C(2)-(3).

tempts to broaden the scope of this claim to include concealment. Tr. 4:54-55. Plaintiffs objected during the pretrial conference and at the charge conference to the court's submitting to the jury only the question whether Tapscott deliberately lied. *Id.* at 4:48. They maintained that while Tapscott did deliberately lie, he also engaged in acts of concealment that constituted a breach of fiduciary duty. *Id.* at 4:48-49. The court held that its summary judgment ruling limited plaintiffs' claims to the ones they had raised in opposition to defendants' motion that presented genuine issues of material fact. *Id.* at 4:54. it reasoned that "of the two issues that were preserved that were successful in opposing summary judgment, one ground was the ground that Mr. Tapscott had deliberately lied to the plaintiffs, and it is in that sense that the case is limited to that particular inquiry." *Id.* at 4:54-55.

The court concluded, as it does today that the summary judgment "motion and the response ha[d] the legal effect of narrowing the allegations of the complaint." *Id.* at 4:55.

Accordingly, the court holds that plaintiffs are precluded from seeking to uphold the verdict based on a concealment claim that exceeds the scope of the one that survived summary judgment.

* * *

For the reasons stated, defendants' renewed motion for judgment as a matter of law is granted, and the court enters judgment dismissing plaintiffs' claim that defendants breached their fiduciary duty by deliberately lying to plaintiffs and informing them that the entire *Jacobs* Litigation had settled, without telling them that Pittsburgh Corning had not settled. Plaintiffs' March 20, 2007 motions for fee forfeiture and for

judgment on the verdict are denied. This case is dismissed with prejudice by judgment filed today.

SO ORDERED.

April 12, 2007.

/s/ Sidney A. Fitzwater
Sidney A. Fitzwater
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:04-CV-1968-D

KARIN JACOBS, *et al.*,
Plaintiffs,

vs.

WILLIAM K. TAPSCOTT, JR., *et al.*,
Defendants.

JUDGMENT

In a memorandum opinion and order filed September 25, 2006, the court granted in part defendants' motion for summary judgment. Plaintiffs' remaining claims were tried to a jury on February 5-8, 2007, and the jury returned a verdict partly in favor of plaintiffs and partly in favor of defendants. Defendants renewed their motion for judgment as a matter of law as to the claim found in favor of plaintiffs. The court has granted the motion in a memorandum opinion and order filed today.

Accordingly, for the reasons set out in the memorandum opinions and orders filed September 25, 2006 and today, and based on the part of the jury verdict that favors defendants, it is ordered and adjudged that this suit is dismissed with prejudice.

Taxable costs of court, as calculated by the clerk of court, are assessed against plaintiffs.

Done at Dallas, Texas April 12, 2007.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed JUN 9, 2006]

Civil Action No. 3:04-CV-1968-D

KARIN JACOBS, PATRIA JACOBS AND JOEANN FROST,
Plaintiffs,

vs.

WILLIAM K. TAPSCOTT, JR. AND BARON & BUDD, P.C.,
Defendants.

PLAINTIFFS' SECOND AMENDED ORIGINAL COMPLAINT

NOW INTO COURT COME Plaintiffs, Karin Jacobs, Patria Jacobs and JoeAnn Frost, and file their Second Amended Original Complaint against the Defendants, William K. Tapscott, Jr. ("Tapscott") and Baron & Budd, P. C. ("Baron & Budd"), and for causes of action against Baron & Budd and Tapscott would show to the Court and jury as follows:

I.

Parties

1. Plaintiff, Karin Jacobs and Plaintiff, Patria Jacobs are citizens of the State of California.

2. Plaintiff; JoeAnn Frost is a citizen of the State of Florida.

3. Defendant Tapscott is a citizen of the State of Texas and may be served with the summons and

complaint at his residence address of 2242 Ash Grove Way, Dallas, Texas 75228 or at his place of business at 3102 Oak Lawn Avenue, Suite 1100, Dallas, Texas 75219.

4. Defendant, Baron & Budd is a professional corporation duly organize and existing under the laws of the State of Texas. Baron & Budd's principal place of business is in

* * * *

12. Jacobs provided detailed information concerning the products containing asbestos that he knew he was exposed to during his employment in the shipyards throughout Texas, Louisiana and Mississippi.

13. After accepting the Jacobs' case on a one-third (1/3) contingency fee employment agreement, the New Orleans attorney, Scott Bickford ("Bickford"), later referred the case to Baron & Budd, a nationally recognized firm that handles asbestos toxic tort litigation for purposes of filing suit in the State of Texas on behalf of the Plaintiffs against various manufacturers, sellers, marketers, and suppliers of asbestos products. Baron & Budd has a national reputation for handling asbestos related toxic tort claims and boasts of its ability to secure recoveries for its clients by settlement and trial of mesothelioma death cases involving the same or similar age and circumstances of Jacobs' death, well in excess of a gross cash settlement amount of $3,000,000.00 in cash. Such information is openly displayed and advertised to the public on the Baron & Budd website and was at all material times available to all of the attorneys at Baron & Budd through its case files and its computer database.

14. Baron & Budd and Tapscott received the detailed information concerning Jacobs' work history and the specific products that contained asbestos that Jacobs had been exposed to or used in the shipyards and accepted the Plaintiffs' case on the basis of the one-third (1/3) contingency fee employment agreement with Bickford.

15. Months after the acceptance of the Plaintiffs' case, Baron & Budd required each of the Plaintiffs to enter into new contingent fee employment agreements which provided for the payment of a forty (40%) contingency fee to Baron & Budd in the event of a settlement prior to trial. Each Plaintiff had their own individual contingency fee employment agreement with Baron & Budd that contained a power of attorney that allowed and permitted Baron & Budd and

* * * *

APPENDIX H

BARON & BUDD
A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS

Employment Agreement and Power of Attorney

This agreement between JoeAnn Frost, client, Martzell & Bickford, and *Baron and Budd, P.C.*, is for legal representation in prosecuting the client's cause of action or claims for damages as a result of injuries sustained by Carl B. Jacobs, Deceased, from exposure to asbestos. The attorneys have not contracted to represent the client for any personal injuries. Further, the attorneys have not contracted to represent the client or decedent in any claims for worker's compensation, any FELA Claims against railroad employers, or any maritime claims against shipowners under the Jones Act. The attorneys hereby advise the client to seek the services of an attorney specializing in those areas of law.

Attorney Fees: This Employment Agreement is a contingency fee contract. Specifically, if the attorneys are successful in recovering money—either by settlement or by a judgment—the attorneys shall receive attorneys fees in the amount of 40% of the gross amount of money recovered. If an appeal is filed, the attorneys shall receive attorneys fees in the amount of 45% of the gross amount of money recovered from that appeal. If the attorneys are not successful, the client will not owe any attorneys fees. The attorneys have the discretion to employ an associate counsel to assist in prosecuting the client's cause of action. Client hereby agrees that the attorneys may employ associate counsel and does not object to the participation of any lawyers the

attorneys may choose to involve in this action. Payment of attorneys fees to associate counsel is the responsibility of the attorneys. Client and the attorneys further agree that said attorneys, if after investigation of the facts and research of the law, believe that client's claims are of limited merit, may cancel this agreement with client and said cancellation will release the attorneys from any further action on client's claim, and discharge said attorneys from this Employment Agreement. Cancellation will be effected by certified mail to the last address provided by client to said attorneys.

Costs and Other Expenses: It will be necessary for said attorneys to incur and advance certain court costs and expenses for the client. These costs may include any of the following: filing and service fees; costs for medical exams, reports and records; travel expenses for the client and the attorneys' employees; court reporter fees; and miscellaneous copying costs and postage. In addition, it will be necessary to employ medical or technical expert witnesses to examine and report on the facts of the client's cause of action. The client agrees that the attorneys have the discretion of employing and paying these expert witnesses. The client further agrees to reimburse the attorneys from any settlement money received—or from payment of any judgment—in the following manner: Upon receipt by the attorneys of the proceeds of any settlement or judgment, the attorneys shall (1) retain 40% (or 45%, if applicable) for attorneys fees, (2) deduct any costs, expenses and expert fees already paid by the attorneys, and (3) disburse the remainder to the client.

I understand that my case may be filed and go to trial with a larger group of asbestos claimants.

Additionally, I understand that certain expenses, including travel and expert expenses, may be incurred jointly in all cases in a group and I authorize the attorneys to prorate expenses among all such cases.

Power of Attorney: The client gives said attorneys, a power of attorney to execute all reasonable and necessary documents connected with the handling of this cause of action, including pleadings, contracts, checks or drafts, settlement agreements, compromises and releases, verifications, dismissals and orders, and all other documents that client could properly execute.

Death of a Client: The provisions of this Employment Agreement will not terminate upon the death of the client whose signature appears below. In the event of the death of the client, any duly appointed Representative of the client's Heirs and/or Estate will be bound by this Employment Agreement to the extent provided by applicable law. In particular, any such Representative will be bound by the provisions of this Employment Agreement relating to the recovery of attorney fees and costs and other expenses.

WITNESS my hand this 23rd day of January, 1997.

Client Signature: JoeAnn Frost

Telephone No: 407-699-9238

Address: 270 Hue Street
Casselberry, FL 32707

APPENDIX I

BARON & BUDD
A PROFFESIONAL CORPORATION
ATTORNEYS AND COUNSELORS

Employment Agreement and Power of Attorney

This agreement between Karin H. Jacobs, client, and *Baron & Budd, P.C.*, is for legal representation in prosecuting the client's cause of action or claims for damages as a result of injuries sustained by Carl Bernard Jacobs, Deceased, from exposure to asbestos. *Baron & Budd* has not contracted to represent the client for any personal injuries. Further, *Baron & Budd* has not contracted to represent the client or decedent in any claim for worker's compensation, any FELA claims against railroad employers, or any maritime claims against shipowners under the Jones Act. *Baron & Budd* hereby advises the client to seek the services of an attorney specializing in those areas of law.

Attorney Fees: This Employment Agreement is a contingency fee contact. Specifically, if *Baron & Budd* is successful in recovering money—either by settlement or by a judgment—*Baron & Budd* shall receive attorneys fees in the amount of 40% of the gross amount of money recovered. If an appeal is filed, *Baron & Budd* shall receive attorneys fees in the amount of 45% of the gross amount of money recovered from that appeal. If *Baron & Budd* is not successful, the client will not owe any attorneys fees. *Baron & Budd* has the discretion to employ an associate counsel to assist in prosecuting the client's cause of action. Client hereby agrees that *Baron & Budd* may employ associate counsel and does not object to the participation of any lawyers *Baron &*

Budd may choose to involve in this action. Payment of attorneys fees to associate counsel is the responsibility of *Baron & Budd*. Client anal *Baron & Budd, P.C.* further agree that *Baron & Budd, P.C.*, if after investigation of the facts and research of the law, believes that client's claims are of limited merit, may cancel this agreement with client and said cancellation will release *Baron & Budd, P.C.* from any further action on client's claim, and discharge *Baron & Budd, P.C.* from this Employment Agreement. Cancellation will be effected by certified mail to the last address provided by client to *Baron & Budd, P.C.*

Costs and Other Expenses: It will be necessary for *Baron & Budd* to incur and advance certain court costs and expenses for the client. These costs may include any of the following: filing and service fees; costs for medical exams, reports and records; travel expenses for the client and *Baron & Budd* employees; court reporter fees; costs and fees associated with any necessary foreign estate administration procedures; and miscellaneous copying costs and postage. In addition, it will be necessary to employ medical or technical expert witnesses to examine and report on the facts of the client's cause of action. The client agrees that *Baron & Budd* has the discretion of employing and paying these expert witnesses. The client further agrees to reimburse *Baron & Budd* from any settlement money received—or from payment of any judgment—in the following manner: Upon receipt by *Baron & Budd* of the proceeds of any settlement or judgment, *Baron & Budd* shall (1) retain 40% (or 45%, if applicable) for attorneys fees, (2) deduct any costs, expenses and expert fees already paid by *Baron & Budd*, and (3) disburse the remainder to the Client.

I understand that my case may be filed and go to trial with a larger group of asbestos claimants. Additionally, I understand that certain expenses, including travel and expert expenses, may be incurred jointly in all cases in a group and I authorize *Baron & Budd, P.C.* to prorate expenses among all such cases.

Power of Attorney: The client gives *Baron & Budd, P.C.*, a power of attorney to execute all reasonable and necessary documents connected with the handling of this cause of action, including pleadings, contacts, checks or drafts, settlement agreements, compromises and releases, verifications, dismissals and orders, and all other documents that client could properly execute. Attorneys agree to consult with client before executing any documents on client's behalf. K.H.J.

WITNESS my hand this 27th day of April, 1998.

Client Signature: Karin H. Jacobs

Telephone No.: 501-922-5857

Address: KARIN H. JACOBS
65 Pontevedra Dr.
Hot Sprines Village, AR 71909

APPENDIX J

BARON & BUDD
A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS

Employment Agreement and Power of Attorney

This agreement between Patria Jacobs, client, and *Baron & Budd, P.C.*, is for legal representation in prosecuting the client's cause of action or claims for damages as a result of injuries sustained by Carl Bernard Jacobs, Deceased, from exposure to asbestos. *Baron & Budd* has not contracted to represent the client for any personal injuries. Further, *Baron & Budd* has not contracted to represent the client or decedent in any claims for worker's compensation, any FELA claims against railroad employers, or any maritime claims against shipowners under the Jones Act. *Baron & Budd* hereby advises the client to seek the services of an attorney specializing in those areas of law.

Attorney Fees: This Employment Agreement is a contingency fee contract. Specifically, if *Baron & Budd* is successful in recovering money—either by settlement or by a judgment—*Baron & Budd* shall receive attorneys fees in the amount of 40% of the gross amount of money recovered. If an appeal is filed, *Baron & Budd* shall receive attorneys fees in the amount of 45% of the gross amount of money recovered from that appeal. If *Baron & Budd* is not successful, the client will not owe any attorneys fees. *Baron & Budd* has the discretion to employ an associate counsel to assist in prosecuting the client's cause of action. Client hereby agrees that *Baron & Budd* may employ associate counsel and does not object to the participation of any lawyers *Baron &*

Budd may choose to involve in this action. Payment of attorneys fees to associate counsel is the responsibility of *Baron & Budd*. Client and *Baron & Budd, P.C.* further agree that *Baron & Budd, P.C.*, if after investigation of the facts and research of the law, believes that client's claims are of limited merit, may cancel this agreement with client and said cancellation will release *Baron & Budd, P.C.* from any further action on client's claim, and discharge *Baron & Budd, P.C.* from this Employment Agreement. Cancellation will be effected by certified mail to the last address provided by client to *Baron & Budd, P.C.*

Costs and Other Expenses: It will be necessary for *Baron & Budd* to incur and advance certain court costs and expenses for the client. These costs may include any of the following: filing and service fees; costs for medical exams, reports and records; travel expenses for the client and *Baron & Budd* employees; court reporter fees; costs and fees associated with any necessary foreign estate administration procedures; and miscellaneous copying costs and postage. In addition, it will be necessary to employ medical or technical expert witnesses to examine and report on the facts of the client's cause of action. The client agrees that *Baron & Budd* has the discretion of employing and paying these expert witnesses. The client further agrees to reimburse *Baron & Budd* from any settlement money received—or from payment of any judgment—in the following manner: Upon receipt by *Baron & Budd* of the proceeds of any settlement or judgment, *Baron & Budd* shall (1) retain 40% (or 45%, if applicable) for attorneys fees, (2) deduct any costs, expenses and expert fees already paid by *Baron & Build*, and (3) disburse the remainder to the client.

I understand that my case may be filed and go to trial with a larger group of asbestos claimants. Additionally, I understand that certain expenses, including travel and expert expenses, may be incurred jointly in all cases in a group and I authorize *Baron & Budd, P.C.* to prorate expenses among all such cases.

Power of Attorney: The client gives *Baron & Budd, P.C.*, a power of attorney to execute all reasonable and necessary documents connected with the handling of this cause of action, including pleadings, contracts, checks or drafts, settlement agreements, compromises and releases, verifications, dismissals and orders, and all other documents that client could properly execute. Attorneys agree to consult with client before executing any documents on client's behalf.

WITNESS my hand this 28th day of April, 1998.

Client Signature: Patria Jacobs

Telephone No.: (213) 665-4878

Address: Patria
Jacobs
P. O. Box 291911
Los Angeles, California 90029

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:04-CV-1968-D

KARIN JACOBS, PATRIA JACOBS AND JOEANN FROST,
Plaintiffs,

vs.

WILLIAM K. TAPSCOTT, JR. AND BARON & BUDD, P.C.,
Defendants.

EXPERT WITNESS REPORT OF PETER E. FERRARO

1. My name is Peter E. Ferraro, I am over the age of twenty-one (21) years of age, and have never been convicted of a misdemeanor or felony involving moral turpitude.

2. I am competent to make this expert witness report.

3. All statements contained herein are made based upon my personal knowledge and are true and correct.

4. I am an attorney licensed to practice law in the State of Texas by the Supreme Court of the State of Texas. I have been licensed to practice law continuously since November 14, 1973 and licensed in the State of Texas since 1981.

5. A true and correct copy of my curriculum vitae is attached hereto.

6. I am solo practitioner and my office is located at 1609 Shoal Creek Blvd, Suite 101, Austin, Texas 78701. My law practice consists primarily of civil litigation matters, with an emphasis on Plaintiff personal injury and business claims.

7. I have practiced law for twenty-six (26) years in the state of Texas, including in the Dallas Fort Worth metroplex.

8. I have personal knowledge of and experience in handling asbestos litigation, including cases involving mesothelioma, throughout the state of Texas.

9. I have personal knowledge experience in working with the law firm of Baron & Budd, P.C. on asbestos litigation matters, including cases involving mesothelioma.

10. I am very familiar with how to prepare, handle, negotiate, settle and/or try personal injury cases, including asbestos exposure cases.

11. I was retained to act as an expert witness in this matter on or about December 17, 2004.

12. In the course of preparing this expert witness report I have reviewed the pleadings on file, the discovery response that have been served, and pertinent underlying documents produced by Baron & Budd, P. C. and by the Plaintiffs, Karin Jacobs, Patria Jacobs, and JoeAnn Frost and a detailed chart of settlement amounts of each settling entity.

13. I was designated in this matter as an expert witness on behalf of Karin Jacobs, Patria Jacobs and JoeAnn Frost on the issues of malpractice, negligence, excessiveness of contingency fees,

and the breech of ethical and fiduciary duties and obligations.

14. In connection with my opinions, it is fundamental that a Texas lawyer know and understand that he or she shall not:

    a. Neglect a legal matter entrusted to the lawyer; or

    b. Frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.

15. In connection with my opinions, it is fundamental that a Texas lawyer know and understand that he or she has a duty and obligation to:

    a. Keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; and

    b. Explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

16. In connection with my opinions, it is fundamental that a Texas lawyer know and understand that if he or she represents two or more clients, then he or she shall not participate in making an aggregate settlement of the claims of or against the clients, unless each client has consented after consultation, including disclosure of the existence and nature of all the claims and of the nature and extent of the participation of each person in the settlement.

17. In connection with my opinions, it is fundamental that a Texas lawyer know and understand that he or she has a duty and obligation:

    a. Upon receipt of funds or other property in which a client or third person has an interest, to promptly notify the client or third person.

    b. Promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

18. In arriving at my opinions in this matter I have considered and reviewed the Texas Disciplinary Rules of Professional Conduct, Tex. Govt Code Ann., Tit, 2. Subtit. G. App. (Vernon Supp. 1995).

19. In arriving at my opinions in this matter I have considered and determined that the Plaintiffs herein sought advice, relied upon the judgment and expertise of the Defendants, individually and collectively, to determine how and in what manner the Jacobs' suit would be prosecuted, which parties would be sued and how the matter would either be settled or prosecuted.

20. In arriving at my opinions in this matter I have considered and determined that the Plaintiffs at all times prior to the filing of the suit, through and including the Defendants' settlement of the Jacobs' litigation in the second quarter of 1999, had no knowledge or lacked sufficient knowledge to understand and appreciate whether entities identified as having produced, sold or marketed products containing asbestos were defendants in

the Jacobs' lawsuit, were in bankruptcy or had previously been adjudged bankrupt.

21. In arriving at my opinions in this matter I have considered and determined that the Plaintiffs did not know, nor were they timely informed by the Defendants, of the impact of bankruptcy on their claims or amounts agreed to be paid in settlement or the ultimate resolution of any settlements with bankrupt defendants.

22. In arriving at my opinions in this matter I have considered, among other things, the facts set forth in the Plaintiffs' First Amended Original Petition.

23. In arriving at my opinions in this matter I have considered, in addition to the facts set forth in the Plaintiffs' First Amended Original Petition, the following facts or admissions:

    a. The initial fee agreement in the Jacobs Case was with the New Orleans law firm Martzell & Bickford.

    b. The initial fee agreement was for the payment of a contingency fee equal to one-third of the recovery prior to a trial and forty percent of the recovery in the event of a trial,

    c. A referral of the Jacobs Case was made by Martzell & Bickford to Baron & Budd, P.C.

    d. Baron & Budd, P.C. accepted the referral of the Jacobs Case under the terms of contingency fee agreement secured by Martzell & Bickford.

    e. After the file was transferred from Martzell & Bickford to Baron & Budd, P.C., Baron & Budd, P.C. required and obtained from each

Plaintiff in this litigation a new and separate contingency fee agreement that provided for a fee equal to forty percent of the recovery prior to a trial and forty-five percent in the event of a trial.

f. The Plaintiffs in this litigation executed a contingency fee agreement that reflected individual not group representation

g. Each contingency fee agreement established that each of the Plaintiff's claims could not be settled for less than a total settlement of $1,000,000.00.

h. Each contingency the agreement required that each Plaintiff be consulted prior to a settlement about the settlement.

i. Baron & Budd, P.C. is a nationally known law firm that holds itself out to the public that it devotes its practice to toxic tort litigation, representing individuals seeking redress from manufacturers of hazardous products including products containing asbestos.

j. At all material times the Defendants had actual and superior knowledge of which manufacturers of products containing asbestos were bankrupt, how long they had been bankrupt and the financial status of the each bankruptcy.

k. Mesothelioma cases are among the most valuable of the cases involving exposure to asbestos products.

l. Baron & Budd, P. C. did not timely provide the Plaintiffs herein with any information

concerning which defendants were bankrupt prior to the filing of the suit or after, how claims against bankrupt entities would be pursued, the impact of bankruptcy on their claims, and the impact of bankruptcy on the amount of settlement monies that would be received.

m. At the time the Jacobs suit was filed the Defendants knew that the following entities had already filed bankruptcy:

1. Johns-Manville;
2. Eagle Picher;
3. Forty-Eight Insulation;
4. Raybestos Manhattan.

n. As many as eight (8) lawyers at Baton & Budd, P.C. at one time or another worked on the Jacobs Case but it was William K. Tapscott, Jr. who appears to have had the most day to day contact with the file, the client's and the opposing counsel in the 1999 to 2000 time frame.

o. Prior to June 1, 1999 William K. Tapscott, Jr. had not tried a case involving damages resulting from exposure products containing asbestos.

p. Prior to June 1, 1999 William K. Tapscott, Jr. had not tried a case involving damages resulting from exposure to products containing asbestos and a diagnosis of mesothelioma.

q. No oral depositions were taken by Baron & Budd, P.C. in the Jacobs case relating to

product exposure, co-workers, doctors and/or health care providers.

r. There was no document created by Baron Budd, P.C. that set forth the internal strategy concerning trial preparation, which Defendant were at the greatest risk, the amounts to demand from each Defendant, and the general value of the Jacobs Case.

s. The Jacobs Case did not fully and completely settle at the time of the June 1, 1999 motion and/or trial docket.

t. On or about Tuesday, June 8, 1999, JoeAnn Frost was informed in a telephone conference with William K. Tapscott Jr. that all of the defendants had agreed to settle the Jacobs' lawsuit.

u. Plaintiffs reasonably believed that a settlement with all defendants in the Jacobs' Case meant that all the defendants had agreed to settle the case, the case would no longer be on the Court's docket, and that settlement agreements and settlement checks would be exchanged.

v. Rule 11 Agreements were not obtained by Baron & Budd, P.C. in connection with each settlement made in the Jacobs Case.

w. No settlements were reached at the time of the June 1, 1999 motion and/or trial docket with Pittsburgh Corning, Rapid American, Fibreboard Corporation.

x. The resolution of the Jacobs Case did not result in a gross settlement to each of the Plaintiff's herein of $1,000,000.00 prior to attorney's fees and expenses.

y. Baron & Budd, P.C. informed the Plaintiff's herein that their case had been settled for a gross amount of $2,450,000.00 without any mention of the impact of the settlements with bankrupt entitles.

z. The settlement of the Jacobs case did not result in a gross cash amount of $2,450,000.00 to the Plaintiffs herein.

aa. The Defendants did not consult with the Plaintiffs individually or collectively prior to negotiating and agreeing to settlements on behalf of the Plaintiffs.

bb. If the Plaintiffs had been fully informed by the Defendants of the actual amounts of the settlement and the actual cash payments they would receive from bankrupt entities, and more importantly, the likelihood that they would not receive the balance, they could have refused to settle with all of the defendants in the Jacobs Case for the amounts Defendants agreed to and accepted on their behalf. Plaintiffs could have demanded more money or demanded that the Jacobs case be tried to a jury. These options, among other potential strategies, were not present or available to the plaintiffs.

cc. The settlement reached with Pittsburgh Corning Company and the Defendants in the fall of 1999 was for less money than was reported in the summer of 1999 and the settlement was not protected from the consequences of a post settlement bankruptcy nor was an arrangement made to have the settlement promptly funded.

dd. The settlement reached with Pittsburgh Corning Company and the Defendants in the fall of 1999 was not funded due to Pittsburgh Corning Company filing for bankruptcy protection.

ee. The settlement reached with Rapid American and the Defendants in the summer of 1999 was not fully funded, was not protected from post settlement agreement financial changes, nor was the settlement agreement enforced.

ff. The settlement reached with Rapid American was renegotiated by the Defendants and reduced by more than fifty (50%) to $52,500.00 from $125,000.00.

gg. The settlement agreement reached with Fibreboard Corporation and the Defendants for $125.000.00 was not fully funded and was not protected from the consequences of a post settlement bankruptcy nor was an arrangement made to have the settlement promptly funded.

hh. The settlement reached with Fibreboard Corporation and the Defendants in the fall was not funded due to Fibreboard Corporation filing for bankruptcy protection.

ii. The Defendants stated that Johns-Manville would pay $200,000.00 to settle the claims of the Plaintiffs herein—Johns-Manville paid $20,000.00.

jj. The Defendants stated that Pittsburg Corning would pay $215,000.00 to settle the claims of the Plaintiffs herein—Pittsburgh Corning paid nothing.

kk. The Defendants stated that Fibreboard Corporation would pay $125,000.00 to settle the claims of the Plaintiffs herein—Fibreboard Corporation paid nothing.

ll. The Defendants stated that Eagle Pitcher would pay $20,021.00 to settle the claims of the Plaintiffs herein—Eagle Pitcher paid $12,074.00

mm. At the end of calendar year 2000, $613,006.00 of the settlement monies had not been paid or received by and from Johns-Manville, Pittsburgh Corning, Rapid American, Fibreboard, and Eagle Pitcher.

nn. By the time the Plaintiffs were able to understand the true nature of the settlement with all of the defendants and the actual amounts they were to receive they no longer had the option of demanding more money or demanding a jury trial.

oo. The Plaintiffs assert that they would not have agreed to settle with all of the defendants in the Jacobs Case based upon the amounts negotiated by the Defendants had they been informed of the true facts concerning the settlement monies to be paid, the ability of the each defendant to make payment and that the gross amount of the settlements negotiated were actually less than $2,000,000.00.

pp. The Plaintiffs assert that they would not have agreed to dismiss claims against other parties that did not make payments to settle the Jacobs Case or would have demanded greater payments from these settling defen-

dants that were financially capable of making settlement payments, had they been informed by the Defendants of the true facts concerning the settlement monies to be paid, the ability of the each defendant to make payment and that the gross amount of the settlements negotiated were actually less than $2,000,000.00.

qq. The Plaintiffs herein, prior to Defendants agreeing to a settlement with all of the parties in the Jacobs lawsuit, were not informed that either Pittsburgh Corning, Fibreboard Corporation, or Rapid American were in poor financial condition or distress.

rr. Each of the Plaintiffs who, at all times material hereto, continues to have an attorney-client relationship with the Defendants, made their own individual financial commitments based upon the assurances from the Defendants of the amounts that they were to receive in settlement with the all the defendants in the Jacobs lawsuit of $2,450,000.00.

ss. Prior the filing of this Original Complaint, the Plaintiffs herein still had not received settlement monies from the Defendants settlements in the Jacobs Case of approximately $350,000.00.

24. In my opinion, the Defendants, individually and collectively, owed a duty to the Plaintiffs to prepare the case for settlement and/or trial. The Defendants breached the duty owed to the Plaintiffs because they did not develop a settlement or trial strategy to bring the Jacobs Case to a

successful conclusion. There is no indication that settlement negotiations were planned, had numerical goals or that there were any offers and counter-offers between the Plaintiffs and the various Defendants in the Jacobs Case. The case was not prepared for trial on or about June 1, 1999 because no depositions had been taken and no testimony developed the product usage and product exposure of Carl Jacobs.

25. In my the Defendants, individually and collectively, owed a duty to the Plaintiffs to keep them reasonably informed about the status of their case, to promptly comply with reasonable requests for information and to explain matters to the extent reasonably necessary to permit the Plaintiffs to make informed decisions regarding their representation. The Defendants breached the duty owed to the Plaintiffs because they failed to inform the Plaintiffs about the bankrupt entities. Defendants breached the duty owed in the Plaintiffs because they failed to inform the Plaintiffs about the effect on payment of a settlement with a bankrupt entity. The Defendants breached the duty owed to the Plaintiffs because they failed to inform the Plaintiffs about the financial condition of Pittsburgh Corning, Rapid American, and Fibreboard. The Defendants breached the duty owed to the Plaintiffs because they failed to inform the Plaintiffs clearly and concisely, before other settlements were agreed to, that a settlement of $200,000.00 with the Manville Trust would only result in an immediate payment of $20,000 00 and that, in all likelihood, no other payment or consideration would be received by the Plaintiffs, in other words such a settlement was not in reality a

settlement for $200.000.00. A similar analysis applies to the settlements on behalf of the Plaintiffs as to the other bankrupt entity settlements. The Defendants breached the duty owed to the Plaintiffs because they failed to inform and consult with the Plaintiffs prior to entering into an agreement to settle with any party to the Jacobs Case or any bankrupt entity. The Defendants breached the duty owed to the Plaintiffs because they failed to inform the Plaintiffs clearly and concisely, that they would not inform them or consult with them about a settlement prior to reaching an agreement. The Defendants breached the duty owed to the Plaintiffs because they failed to inform the Plaintiffs clearly and concisely, that William K. Tapscott, Jr., the attorney handling the Jacobs Case on a day-to-day basis had no trial experience and limited experience in all phase of asbestos litigation.

26. In my opinion, the Defendants, individually and collectively, owed a duty to the Plaintiffs to inform them that a potential conflict existed in connection with the settlements with parties to the Jacobs Case because some of the settlements made would be inclusive of other Plaintiffs and consequently a conflict exists concerning aggregated settlements, the amounts of the settlements and the allocations of the settlement funds. Further the Defendants breached the duty owed to the Plaintiffs because they failed to notify them about aggregate settlements and failed to secure in writing each of the Plaintiff's consent, after consultation, including disclosure of the existence and nature of all the claims and

of the nature and extent of the participation of each person in the settlement.

27. In my opinion, the Defendants, individually and collectively, owed a duty to the Plaintiffs upon receipt of funds or other property in which a client or third person has an interest to promptly notify the client or third person. Defendants breached the duty owed to the Plaintiffs because they failed to promptly notify the Plaintiffs of the receipt of settlement monies, to promptly disburse the settlement funds and to render an accounting. As an example Baron & Budd notified Scott Bickford in writing that it had approximately $60,000.00 in settlements on behalf of the Plaintiffs. The Plaintiffs were not provided this information and the funds were not disbursed until several months later. Baron & Budd received a settlement check For $20,000.00 on behalf of the Plaintiffs on or about March 15, 1999, deposited it into a bank account and did not inform the Plaintiffs that a settlement had been made nor did it disburse the funds.

28. Baron & Budd, P.C., several months into their representation of these plaintiffs, had them sign a new contingency fee agreement at the level of 40% in the event of a resolution prior to trial and 45% in the event of a trial, rather than the one-third fee in the event of a resolution prior to trial and 40% in the event of a trial contained in the contingency fee agreement of the New Orleans law firm Martzell & Bickford. While I agree that Baron and Budd possesses the expertise and experience that may justify an increased fee in asbestos related litigation, I question the timing of the changes and, more importantly, question

why that expertise was not fully applied to this case.

29. In my opinion, the Defendants, individually and collectively were negligent in failing to prepare the Jacobs Case for trial and to establish a strategy of procedure for maximizing their efforts to achieve the highest possible settlements with each Defendant in the Jacobs Case.

30 In my opinion, the Defendants, individually and collectively, were negligent in failing to consult with the Plaintiffs prior to negotiating or accepting an offer to settle from any of the Defendants in the Jacobs Case.

31. In my opinion, the Defendants, individually and collectively, were negligent in failing to disclose to the Plaintiffs that the attorneys handling the day-to-day activities in the Jacobs Case were inexperienced, and had little if any trial experience and that they were not being regularly supervised by those within the firm that actually possessed that expertise

32. In my opinion, the Defendants, individually and collectively, were negligent in assigning and permitting attorneys that were inexperienced with little, if any, trial experience to handle the day-to-day activities in the Jacobs Case without sufficient supervision.

33. In my opinion, the Defendants, individually and collectively, were negligent in failing to advise or inform the Plaintiffs as to which entities made or supplied asbestos containing products were bankrupt prior to the filing of the suit, how claims against bankrupt entities would be pursued, the impact or bankruptcy on their claims,

and the impact of bankruptcy on the amount of settlement monies that would be received.

34. In my opinion, the Defendants, individually and collectively, were negligent in failing to obtain testimony or to take depositions in the Jacobs Case relating to product exposure, co-workers, doctors and/or health care providers of Carl Jacobs.

35. In my opinion, the Defendants, individually and collectively, were negligent in failing to obtain or secure enforceable Rule 11 Agreements as to each settlement made with a Defendant in the Jacobs Case.

36. In my opinion, the Defendants, individually end collectively, were negligent in informing the Court and the Plaintiff that the entire Jacobs Case had settled at the time of the June 1, 1999 motion and/or trial docket when it had in fact not completely settled because settlements had not been reached with Pittsburgh Corning, Rapid American, Fibreboard Corporation.

37. In my opinion, the Defendants, individually and collectively, were negligent in failing to take prompt action to attempt to secure the payment of settlement monies from Pittsburgh Corning Corporation, Fiberboard Corporation, so that a future bankruptcy filing would not disturb or affect the Plaintiffs' settlement.

38. In my opinion, the Defendants, individually and collectively, were negligent in failing to secure the prompt and immediate payment of settlement monies from Rapid American so that future events would not disturb or affect the Plaintiffs' settlement.

39. In my opinion, the Defendants, individually and collectively, were negligent in failing to enforce the Rule 11 Agreement concerning the Rapid American.

40. In my opinion, the Defendants, individually and collectively, were negligent in renegotiating and agreeing to reduce the amount of Rapid American settlement without first informing or advising the Plaintiffs.

41. In my opinion, the Defendants, individually and collectively, were negligent in failing to investigate, inquire or determine whether Pittsburgh Corning, Fibreboard Corporation, and/or Rapid American were in poor financial condition or distress, and to inform the Plaintiffs.

42. In my opinion, by the time the Plaintiffs were able to understand the true nature of the settlement with all of the defendants and the actual amounts they were to receive the no longer had the option of demanding more money or demanding a jury trial.

43. In my opinion, the Defendants, individually and collectively, were negligent in concluding and representing to the Plaintiffs that the Jacobs Case had settled for a gross cash amount of $2,450,000.00.

44. In my opinion, the Defendants, individually and collectively, were negligent in failing to pursue claims against product manufacturers that were identified by Carl Jacobs prior to his death.

45. In my opinion, the settlement value of the claims had a low end range value of $3,000,000.00.

46. In my opinion, as a result of the breach of duty and the negligent conduct of the Defendants, individually and collectively, the Plaintiffs have as a proximate result thereof suffered damages in an amount not less than $350,000.00.

47. In my opinion the services performed by the Defendants, individually and collectively, fall below the standard of care and do not reflect the kind or expertise that would justify any increase in the fee contract. Consequently it is my opinion that the contingency fee charged by Baron and Budd is excessive. For the reason stated above it is also my opinion that the fee should be disgorged.

48. I have arrived at an opinion concerning reasonable attorney's fees in this matter.

49. In arriving at an opinion concerning what constitutes a reasonable and necessary attorney's fee in this matter, I have considered the State Bar Rules set forth in the Texas Government Code.

50. In arriving at an opinion concerning what constitutes a reasonable and necessary attorney' fee in this matter, I have considered the following factors:

    a. The time and labor required;

    b. The novelty and difficulty of the questions involved;

    c. The skill requisite to perform the legal service properly;

    d. The likelihood that the acceptance of the particular employment will preclude other employment;

e. The fee customarily charged in the locality for similar legal services;

f. The amounts involved;

g. The results to be obtained;

h. The circumstances of the case; and

i. The experience, reputation, and ability of the attorney performing the services.

51. In arriving at an opinion concerning what constitutes a reasonable and necessary attorney's fee in this matter, I have considered the fact that the dispute might not be settled, and that a trial May be necessary.

52. In my opinion, an hourly rate of $300.00 per hour for a matter of this type is a fair and reasonable hourly rate for attorney time and $125.00 per hour for an experienced paralegal.

53. In arriving at the opinions that I have expressed herein I have reviewed portions of the Jacobs file but not the entirety of the file. It is also my understanding that discovery is continuing. I will continue by review of file materials that have been produced and that may be produced. I therefore reserve the right update, modify or alter the opinions expressed herein in the event evidence is brought to my attention which warrants such change.

/s/ Peter E. Ferraro
PETER E. FERRARO

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:04-CV-1968-D

KARIN JACOBS, PATRIA JACOBS AND JOEANN FROST,
Plaintiffs,

vs.

WILLIAM K. TAPSCOTT JR. AND BARON & BUDD, P.C.,
Defendants.

AFFIDAVIT OF KARIN JACOBS

BEFORE ME, the undersigned Notary, on this day personally appeared, Karin Jacobs, and deposed and testified as follows:

1. "My name is Karin Jacobs, I am eighteen (18) years of age, and have never been convicted of a misdemeanor or felony involving moral turpitude.

2. "I am competent to make this oath and affidavit.

3 "All statements contained herein are made based upon my personal knowledge and are true and correct.

4. "I never granted nor intended to grant Baron & Budd and Tapscott the right to settle any portion of the claims without my approval and consent.

5. "I never granted nor intended to grant Baron & Budd and Tapscott the right to settle any portion of the claims without my consent or approval by executing Rule 11 Agreement.

6. "I never granted nor intended to grant Baron & Budd and Tapscott the right to dismiss any portion of the claims without my approval or consent.

7 "I did not agree to authorize that the value of entire case at $1,000,000.00.

8. "I never authorized nor intended to authorize the settlement of any claim on the basis something other than cash.

9. "I never authorized nor intended to authorize the settlement of any claim on the basis of a pay out agreement.

10. "I never received a written evaluation of my case that included a settlement analysis of the strong and weak points from Baron & Budd.

11. "Baron & Budd was provided with the product identification information that Carl Bernard Jacobs provided to Scott Bickford and Martzell & Bickford.

12. "Baron & Budd was provided with the coworker witness information that Carl Bernard Jacobs provided to Scott Bickford and Martzell & Bickford.

13 "I never received notice from Baron & Budd that it had received a settlement check in the amount of $20,000.00 dated March 15, 1999.

14. "I was not told prior to the commencement of this suit that Tapscott had no first chair trial experience in mesothelioma cases.

15. "At the time I was informed that the entire case had settled in June 1999 I was not aware or informed that some of the settlement would be worthless notes.

16. "At the time I was informed that entire case had settled in June 1999 for $2,400,000.00 to $2,500,000.00 or perhaps more with the Defendants I was not aware or informed that the settlement amounts included worthless notes.

17. "At the time I was informed that the case settled in June 1999 I was not provided with details or information as to who was paying the settlements and how much was being paid by each party.

18. "At the time I was informed that the case settled in June 1999 I was not informed that some of the settlements would have to be paid out over time.

19. "At the time I was informed that the case settled in June 1999 I was not told that Rule 11 Agreements had been or would be signed by Baron & Budd without my consultation and approval.

20 "I was not informed by the Defendants that Pittsburgh Corning Corporation did not settle the case for $225,000 prior to the November 16, 1999 trial setting.

21 "I was not informed by the Defendants that Rapid American Corporation could not fund the entire settlement in 1999.

22 "I was not informed of the legal basis I could refuse to sign settlement agreements after the Defendants had signed Rule 11 Agreements settling claims with the Defendants.

23 "Although I was informed that I could agree to settle or not to settle with a bankrupt entity I was provided with no relevant information from the Defendants in order to make a decision or judgment.

24. "I was not provided with sufficient information from the Defendants in order to make informed decisions about my case and the settlement with or dismissal of defendants against who claims had been made.

25. "I was not provided with sufficient information from the Baron & Budd and Tapscott to understand why claims were not pursued against the Defendants that were dismissed.

Further Affiant Sayeth Not

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:04-CV-1968-D

KARIN JACOBS, PATRIA JACOBS AND JOEANN FROST,
Plaintiffs,

vs.

WILLIAM K. TAPSCOTT JR. AND BARON & BUDD, P.C.,
Defendants.

AFFIDAVIT OF PATRIA JACOBS

BEFORE ME, the undersigned Notary, on this day personally appeared, Patria Jacobs, and deposed and testified as follows:

1. "My name is Patria Jacobs, I am eighteen (18) years of age, and have never been convicted of a misdemeanor or felony involving moral turpitude.

2. "I am competent to make this oath and affidavit.

3. "All statements contained herein are made based upon my personal knowledge and are true and correct.

4. "I never granted nor intended to grant Baron & Budd and Tapscott the right to settle any portion of the claim without my approval and consent.

5. "I never granted nor intended to grant Baron & Budd and Tapscott the right to settle any portion of the claims without my consent or approval by executing a Rule 11 Agreement.

6 "I never granted nor intended to grant Baron & Budd and Tapscott the right to dismiss any portion of the claims without my approval or consent.

7. "I did not agree to authorize that the value of entire case at $1,000,000.00.

8. "I never authorized nor intended to authorize the settlement of any claim on the basis something other than cash.

9. "I never authorized nor intended to authorize the settlement of any claim on the basis of a pay out agreement.

10. "I never received a written evaluation of my case that included a settlement analysis of the strong and weak points from Baron & Budd.

11. "Baron & Budd was provided with the product identification information that Carl Bernard Jacobs provided to Scott Bickford and Martzell & Bickford.

12. "Baron & Budd was provided with the coworker witness information that Carl Bernard Jacobs provided to Scott Bickford and Martzell & Bickford.

13 "I never received notice from Baron & Budd that it had received a settlement check in the amount of $20,000.00 dated March 15, 1999.

14. "I was not told prior to the commencement of this suit that Tapscott had no first chair trial experience in mesothelioma cases.

15. "At the time I was informed that the entire case had settled in June 1999 I was not aware or informed that some of the settlement would be worthless notes.

16. "At the time I was informed that entire case had settled in June 1999 for $2,400,000.00 to $2,500,000.00 or perhaps more with the Defendants I was not aware or informed that the settlement amounts included worthless notes.

17. "At the time I was informed that the case settled in June 1999 I was not provided with details or information as to who was paying the settlements and how much was being paid by each party.

18. At the time I was informed that the case settled in June 1999 I was not informed that some of the settlements would have to be paid out over time.

19. "At the time I was informed that the case settled in June 1999 I was not told that Rule 11 Agreements had been or would be signed by Baron & Budd without my consultation and approval.

20 "I was not informed by the Defendants that Pittsburgh Corning Corporation did not settle the case for $225,000 prior to the November 16, 1999 trial setting.

21 "I was not informed by the Defendants that Rapid American Corporation could not fund the entire settlement in 1999.

22. "I was not informed of the legal basis I could refuse to sign settlement agreements after the Defendants had signed Rule 11 Agreements settling claims with the Defendants.

23. "Although I was informed that I could agree to settle or not to settle with a bankrupt entity I was provided with no relevant information from the Defendants in order to make a decision or judgment

24. "I was not provided with sufficient information from the Defendants in order to make informed decisions about my case and the settlement with or dismissal of defendants against who claims had been made.

25, "I was not provided with sufficient information from the Baron & Budd and Tapscott to understand why claims were not pursued against the Defendants that were dismissed.

Further Affiant Sayeth Not

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No 3:04-CV-1968-D

KARIN JACOBS, PATRIA JACOBS AND JOEANN FROST,
Plaintiffs,

VS.

WILLIAM K. TAPSCOTT, AND BARON & BUDD, P.C.,
Dependants.

AFFIDAVIT OF JOEANN FROST

BEFORE ME, the undersigned Notary, on this day personally appeared, JoeAnn Frost, and deposed and testified as follows:

1. "My name is JoeAnn Frost, I am eighteen (18) years of age, and have never been convicted of a misdemeanor or felony involving moral turpitude.

2. "I am competent to make this oath and affidavit.

3. "All statements contained herein are made based upon my personal knowledge and are true and correct.

4. "I never granted nor intended to grant Baron & Budd and Tapscott the right to settle any portion of the claims without my approval and consent.

5. I never granted nor intended to grant Baron & Budd and Tapscott the right to settle any portion of the claims without my consent or approval by executing a Rule 11 Agreement.

6. "I never granted nor intended to grant Baron & Budd and Tapscott the right to dismiss any portion of the claims without my approval or consent.

7. I did not agree to authorize that the value of entire case at $1,000,000.00.

8. I never authorized nor intended to authorize the settlement of any claim on the basis of something other than cash.

9. I never authorized nor intended to authorize the settlement of any claim on the basis of a pay out agreement.

10. I never received a written evaluation of my case that included a settlement analysis of the strong and weak points from Baron & Budd.

11. Baron & Budd was provided with the product identification information that Carl Bernard Jacobs provided to Scott Bickford and Martzell & Bickford.

12. Baron & Budd was provided with the coworker witness information that Carl Bernard Jacobs provided to Scott Bickford and Martzell & Bickford.

13. I never received notice from Baron & Budd that it had received a settlement check in the amount of $20,000.00 dated March 15, 1999.

14. I was not told prior to the commencement of this suit that Tapscott had no first chair trial experience in mesothelioma cases.

15. At the time I was informed that the entire case had settled in June 1999 I was not aware or informed that some of the settlement would be worthless notes.

16. At the time I was informed that the case settled in June 1999 I was not provided with details or information as to who was paying the settlements and how much was being paid by each party

17. At the time I was informed that the case settled in June 1999 I was not informed that some of the settlements would have to be paid out over time.

18. At the time I was informed that the case settled in June 1999 I was not told that Rule 11 Agreements had been or would be signed by Baron & Budd without my consultation and approval.

19. I was not informed by the Defendants that Pittsburgh Corning Corporation did not settle the case for $225,000 prior to the November 16, 1999 trial setting.

20. I was not informed by the Defendants that Rapid American Corporation could not fund the entire settlement in 1999.

21. I was not informed of the legal basis I could refuse to sign settlement agreements after the Defendants had signed Rule 11 Agreements settling claims with the Defendants.

22. Although I was informed that I could agree to settle or not to settle with a bankrupt entity I was provided with no relevant information from the Defendants in order to make a decision or judgment.

23. I was not provided with sufficient information from the Defendants in order to make informed decisions about my case and the settlement with or dismissal of defendants against who claims had been made.

24. I was not provided with sufficient information from the Baron & Budd and Tapscott to understand why claims were not pursued against the Defendants that were dismissed.

25. "I was informed that there would be additional legal fees if I rejected the offer of a bankrupt entity and wanted to pursue a hearing or arbitration of the claim.

Further Affiant Sayeth Not

APPENDIX O

BARON & BUDD
A Professional Corporation
Attorneys and Counselors
3102 Oak Lawn Avenue
Suite 1100
Dallas, Texas 75219-4281
(214) 521-3805
Telecopier (214) 520-1181

June 2, 1999

VIA FACSIMILE 860-547-1321

Cathy Mohan
Lynn Valzania
Danaher, Tetford, Lagnese & Neal
21 Oak Street, Ste. 700
Hartford, CT 06106

Re: Pittsburgh Corning
June 1, 1999 Trial Settings

Dear Cathy and Lynn,

This letter is to confirm that we agree with the settlement amounts per our meeting relating to the June 1, 1999 trial settings I have listed these agreed values below.

Jacobs et al. Galveston County Trial Setting 6/1/99

JACOBS, CARL BERNARD (d) ME 225,000

If you have any questions, please contact our office.

Sincerely,

BARON & BUDD, P.C.
/s/ Christina Manucso
CHRISTINA MANUCSO

APPENDIX P

June 14, 1999

To: Ken Tapscott, Attorney
3102 Oak Lawn Avenue
Suite 1100
Dallas, Texas 75219-4281

By Fax: To 214-520-1181
1 page

From: John Frost
Fax: 407-699-9238
Phone: 407-234-3574
RE: *Carl B. Jacobs, et al., v. Waterman*
97CV0384, 212 Judicial District Galveston, TX

Message:

1. Thank you for sending the tapes of Dr. Roggli. I am putting a check in the mail to you.
2. Thank you for calling me Tuesday to let me know that all Defendants have settled this matter.
3. It is my understanding that Baron and Budd have been holding $59,000.00 in escrow since the first of 1999 and those funds will be distributed, after attorney fees are deducted, within a few days. I would appreciate a call from your secretary or paralegal advising me when I should leave a note for the FED/EX.
4. It is also my understanding that you have no need for me to sign and/or notarize anything else pertaining to the acceptance or release of the escrowed

money, as Ms. Jacobs has already taken care of that.

5. It is also my understanding that the remaining settlement funds typically take 30-60 days to disburse.

Please advise me if there is anything I can do to facilitate any closings regarding this case.

Sincerely,

/s/ JoeAnn Frost
JoeAnn Frost

Most defendants don't pay until 90-120 days AFTER RETURN OF THE RELEASE. A few take longer. Most of the settlement money will be in by the end of the year, and you can expect quick payment. A few defendants JoeAnn, could run into next year with their payments, however. Ken

APPENDIX Q

Deposition Excerpt of Peter Ferraro

* * * *

[77] was settled. That having not occurred, what they should have done was advise the Plaintiffs that that announcement in open court specifically in their case and that their earlier agreement to settle with this plaintiff specifically had no effect—if that, in fact, was legally the case, specifically had no effect on their ability to go back into that same court and continue their case against that defendant, and they should have then advised what effects that would have. Partly, as to that last point, what effects that would have that was—part of that was included in the—in the letters they sent that I read.

Q. Well, is it your testimony that Baron & Budd didn't have their authority before entering settlements?

A. That depends on two things, or actually six things because there's three Plaintiffs. The contingency fee contract wherein they interlineated that before any documents were signed, they had to be talked to, and the letters that describe the $1 million limit issue on the authority to settle.

Q. Well, I'm not sure I understand your—your statement. Do you have an opinion as to whether or not Baron & Budd had authority from the Plaintiffs to make settlements that they made in this case? That they had authority or they didn't have authority? Do you have an [78] opinion about that?

A. Yes.

Q. What's your opinion?

A. My opinion is that they had authority to settle this case up to $1 million for each Plaintiff based on their correspondence and the contingency fee

agreements, and that even with that authority, that relative to the contingency fee agreements, they had to discuss the settlement with the Plaintiffs.

Q. So you—you say that with respect to the case, each Plaintiff should have received—I mean, Baron & Budd had $1 million authority as to each Plaintiff?

A. That's what it says in the individual letters to the Plaintiffs, yes.

Q. Well—

A. And my opinion is that that is what they committed to.

Q. Okay. And how do you explain the probate joint settlement distribution agreement?

A. The split between the dollar amount? Is that what you're referring to?

Q. No. I'm referring to an agreement approved by a probate court as to how money was to be divided in the asbestos case

[79] A. I don't think that that follows, that they didn't have authority for a million each just because they—

Q. Well, how could it? If they had authority for a million each—

A. Uh-huh.

Q. —then there would—

A. A minimum. That was a minimum.

Q. —there wouldn't have been a discrepancy as to the amount of money each got, would there?

A. Oh, yeah. There could be. One could be settled for four, one could be settled for two, one could be settled for a million-one.

Q. Okay. All right. Let me—let me understand—let me understand this. Your opinion is that despite the fact that the Plaintiffs were happy about the 2.48 and only unhappy that they didn't collect it all, they should recover from Baron & Budd the difference between forty percent of $1 million times $1 million,

plus $1 million and $1 million, because that's the only authority that Baron & Budd had; and therefore, settling a case without authority caused $800,000 worth of damage?

A. That's not my testimony.

Q. Okay. Well, let's—let's see if that's not [80] your testimony. The Plaintiffs in this case have said that what they're mad about is they were told the case settled for $2.4 million something and what the Plaintiffs actually received was around 2.1. And they didn't receive the rest of it.

A. Um-hum.

Q. Do you agree that that's one of their—that's their complaint?

A. Their complaint is that they're—one of their complaints is they were down $350,000 roughly, approximately—

Q. Okay. That—

A. —from the amount they were told the case settled for to the amount they actually got. That is one of their claims.

Q. Okay Now, we all know that that isn't accurate to begin with, right?

A. I don't know what you mean.

Q. Well, I mean that they were never told that they—the case had been settled for $2.48 million.

A. I think there's probably a factual issue on that. I think JoeAnn—JoeAnn Frost actually was told that.

Q. Do you know—have you reviewed any written 1 correspondence between Baron & Budd and the Plaintiff's as [81] to what the settlement was and what the breakdown was of the settlement?

A. Yeah. Two or three actual breakdowns after the settlement, yeah.

Q. And what—was the breakdown 2.4?

A. After the settlement?

Q. Yeah.

A. As to what they would actually get?

Q. Yeah. Was that the number if you add it all up?

A. I believe on one of the letters, it was the number. But they put asterisks next to it as to whether or not Johns-Manville would pay more than twenty and the likelihood of that I mean, the—the actual dollar amount that they were going to get was not—they totaled up all of the settlements, and they came to that amount.

Q. 2.4?

A. Yeah. 2.45 or whatever. I don't remember the exact amount. 2.5—whatever it was, they came to that amount. And they came at various times. So at each time, it might have been different because some of the moneys might not have come in. But yeah, they totaled that amount.

And then in that letter, they highlighted [82] or—or footnoted the various settlements that wouldn't be funded, which came to a lower amount. And that is correct. That was written after the settlement was announced in open court and after the parties had agreed to it, and they got that information.

Q. And it was with respect to that letter that they advised Baron & Budd that was fine. Are you aware of that fact or not aware of that fact?

A. Well, I didn't see anything that said they advised Baron & Budd, quote, unquote, that was fine. I think that they were, based on my understanding of the facts, always upset with the fact that they didn't get the full amount that they thought they were going to get when they were told originally that it had settled for 2.5. I think those letters were subsequent to the original settlement of the case. And the announcement—I'm sure those letters were sub-

sequent to the announcement that the case had been settled in open court, and the conversation with JoeAnn Frost that day that Mr. Tapscott had that she testified that she was told that the gross amount was going to be 2.5 or 2.45 or whatever it was.

Q. Okay.

THE VIDEOGRAPHER: Excuse me. Bob—

Q. (BY MR. GREENBERG) Was it—

[83] THE VIDEOGRAPHER: Bob, I need to change tape real quick.

MR. GREENBERG: Okay.

THE VIDEOGRAPHER: off the record at 3:20.

(Recess taken)

THE VIDEOGRAPHER: Beginning Tape Number 2. Back on the record at 3:21.

Q. (BY MR GREENBERG) So as you read—you haven't talked to the Frost—Frost or the Jacobs, have you?

A. No.

Q. Okay.

A. I have not talked to them.

Q. As you read the pleading and talk to Mr. Lynch, your understanding is that this lawsuit is about the Plaintiffs not recovering—recovering what they recovered as opposed to what they were told they were going to recover?

A. In part, yes.

Q. Let's talk about that part.

A. Okay.

Q. Okay? What are the damages as the result of that part?

A. Well, my opinion about those damages, if you are asking, is that it's a mechanical difference

between [84] what they were told they were going to recover and what they recovered. And—

Q. That would be—

A. And—

Q. I'm sorry.

A. That's all right. And the—had all of that been explained prior to settlement of the case, the opportunity to go forward with a case that had significant value and could have resulted in a verdict larger than the settlement amount payable by solvent defendants or defendants with enough insurance coverage to pay.

Q. Okay. And what is your opinion about the amount of money that would have been recovered?

A. Well—

Q. I mean, are you rendering that opinion?

A. Well, if you want to ask me, I've got an idea. I've got an opinion, but I wasn't asked to do that in the case—

Q. What did Mr. Jacobs do?

A. —but I've got an opinion. What did Mr. Jacobs do?

Q. Yeah. Don't you need to know that to know—

A. He had—he had—yeah, he had a number of jobs The—from a boat captain to repairing working,

* * * *

APPENDIX R

Deposition Excerpt of Mark Hendrix

* * * *

[105] Q. You're talking about tactics, aren't you?

A. I don't think so.

Q. Well, certainly, you don't have any hard evidence and none has been shown you that those conclusions are correct?

MR. LYNCH: Object to the form. Ambiguous.

A. I don't understand your question.

Q. (BY MR. GREENBERG) Well, which defendant settle for what the defendant was going to settle for because on that occasion the trial lawyer wasn't there?

A. My—my evidence is that Pittsburgh-Corning did not settle at that time because the case was theoretically not going to go to trial, although a motion for continuance was denied and it was set for trial, and that was their reason for not keeping—for not following through with the settlement that was supposedly obtained at that time.

Q. So number one, this is limited to Pittsburgh-Corning?

A. As my evidence that I know of, yes.

Q. All right.

A. The rest of it—

Q. And all you know about Pittsburgh-Corning is what happened. You don't know why Pittsburgh-Corning did [106] what they did?

A. I have not talked to Pittsburgh-Corning.

Q. So then you don't know why they did it?

A. I do not know what was in their head. That is correct

Q. Right. So what you're doing is you're saying if it was up to me, from a strategy standpoint, I might

could have forced Pittsburgh-Corning not to make that decision if the trial lawyer that was going to try the case was present on the day it was called for trial. Isn't that what you're saying?

A. I'm saying in my experience in this litigation, the case is settled based upon trial settings; that when I was involved in it and it was coming down, even if the case was going to trial the next day, Baron & Budd lawyers were there, ready to try the case, bringing their boxes in, getting ready to go, and that put pressure on the defendants to settle that case. That's what I'm saying.

Q. Yeah It's a strategy position, right?

A. Well, I don't know what you mean by that. I mean, I believe that it's a practical—

Q. Well, there are many, many choices—there are many, many choices law firms have of when to send trial lawyers to try cases. They can send them ten days [107] before the trial, three days before a trial, the day before the trial, or the day the jury is picked, right? They can send them any of those times?

A. That's true.

Q. Okay. So it's a tactical decision as to which of those days the law firm chooses to send the lawyer who is going to try the case?

A. It is the law firm's decision, and I don't know what you mean when you say tactical as opposed to strategic or as opposed to—I mean, it is the law firm's decision when they send which lawyer to what event I agree with that.

Q. And what you're telling this Court and this jury, that if the trial lawyer had been there on the trial setting, Pittsburgh-Corning wouldn't have done what they did?

A. No. I'm saying that I think that it would have been more appropriate and appropriate for the trial

lawyer to be there. And that based upon the facts that I've heard, there's a lot greater likelihood Pittsburgh-Corning would have entered into a Rule 11 agreement on or shortly after June the 1st, 1999.

Q. Can you tell us what Pittsburgh-Coming would have paid had a trial lawyer been there?

A. I don't know that.

[108] Q Okay. How do you find—what do you define to be lawyer's negligence in a—in a legal term?

A. I don't understand.

Q. What are the circumstances under which lawyers are negligent?

A. It's a factual determination.

Q. No, not whether they're negligent, but what it takes for them to be negligent.

A. It would be a breach of their standard of care.

Q. Okay. Now, the standard of care of a lawyer is—what's the standard?

A. Are you asking me what the standard is? It's the standards that are setup by the disciplinary rules and the custom and practice in the area.

Q. Where does the disciplinary rules say anything about when a trial lawyer shows up at a trial?

A. Oh, they don't. But I mean, it's a practical—

Q. I'm not talking about the standard—

MR. LYNCH: Hold on, hold on. He's tying to answer a question.

MR. GREENBERG: Well, he's not doing a very good job at answering the question I asked.

MR. LYNCH: Well, whether he is or not, he's [109] entitled to finish his answer. And if you afford him that courtesy and make an objection and reask it or whatever needs to be done, but I'm going to insist that he be allowed to finish his answer.

MR GREENBERG: I'm happy for him to filibuster all he wants.

MR. LYNCH: He's not filibustering. He's answering your question.

MR. GREENBERG: Well, that's your opinion.

MR. LYNCH: Well, he's entitled without interruption—

MR. GREENBERG: That's fine. Let him talk. I'll be quiet.

A. My experience in this situation is—with Baron & Budd was I was on both ends of the spectrum. And I—and I recognized the difference and I reacted differently. That is, I showed up on cases when Russell Budd or Lisa Blue was there ready to go to trial, and I knew they were serious and that this case was going to go to trial. I also showed up in situations back when Andy Waters was the only lawyer there, and I knew he was unable to try the case by himself, so I knew they were not significant, and I reacted differently in those responses. And that's—that's—that's from where I get my testimony.

[110] Q. Do you know why the case was continued?

A. My understanding from Mr. Tapscott's deposition is he announced that it settled.

Q. Well, that's not a continuance, is it?

A. No. I didn't—my understanding was that the motion for continuance was denied, but that it was announced at that time that the case had settled.

Q. Okay. Do you have any facts that would show that at the time that announcement was made, Pittsburgh-Corning hadn't agreed to their portion of the settlement?

A. That they hadn't agreed to it?

Q. Yeah.

A. No.

Q. Well, if Pittsburg Corning had agreed to it and everybody else had agreed to it, then it was an appropriate announcement to make by the lawyer, right?

A. I am not saying in any form or fashion that Mr. Tapscott intentionally misled the court. I don't—but I don't have any facts upon which I—that's not what I'm saying. I mean, obviously, it wasn't settled as to Pittsburgh-Corning because it was put back on the trial docket and another settlement was reached. That's what I'm talking about, not—I don't think Mr. Tapscott—I have no reason to believe Mr. Tapscott [111] intentionally misled the court.

Q. Wait a minute now. If Mr.. Tapscott represented to the court that the case was settled, which would have included Pittsburgh-Corning, and Pittsburgh-Corning had, in fact, told Mr. Tapscott it was settled for an agreed upon amount—

A. Well, they didn't do that.

Q. —and that was announced to the court, and then the next day Pittsburgh-Corning says we're not going to do that, where is the fact that the trial lawyer is not there on the day it is set for trial—how does that have anything to do with what actually happened in the case?

A. Number one, your hypothetical, my understanding is that Pittsburgh-Corning did not tell Mr. Tapscott that the case was settled; that he had no discussions with them. But I don't think, under that hypothetical that you have provided me, that not having a trial lawyer there—I can't say that that would have kept Pittsburgh-Corning from backing out of a settlement. I cannot say that.

Q. Okay. Well, do you agree that if Pittsburgh-Corning told other lawyers at Baron & Budd that they would pay so much and that information was transmitted to Tapscott, that's tantamount to it being [112] told to Tapscott?

A. I believe that he had the information from Baron & Budd. He's testified that he did. I believe it. I mean, I don't see any reason to doubt that testimony.

Q. I'm trying to find out if there was an appropriate announcement to the court that the case didn't go to trial because it was settled—

A. I have—

Q. Let me finish—

A. I'm sorry.

Q —my question.

A. I'm sorry.

Q. Let me start over because I want to be clear on my question. If the court obtained correct information that at the time the case was set for trial an announcement was made on behalf of the plaintiff that the case was settled, and if at that point in time, the defendants had agreed to settle, whether it be with the lawyer who made the announcement or with other members of his firm, what would the failure of the firm representing the plaintiffs from having their trial lawyer present—how would that have affected the announcement that the case was settled?

A. My understanding was—is that it was Pittsburgh-Corning's position that the case was not [113] settled and had not settled and that it was later settled. I believe that if the trial lawyer would have been there and they would have been ready to go to trial; that issue would have been resolved at that point in time, period. That's what I believe.

Q. Well, if that's your theory and there wasn't a Pittsburgh-Corning settlement in June, then what does that do with your opinions that Baron & Budd didn't afford—didn't enforce Pittsburgh Corning's agreement to settle?

A. One, I was—the—enforcing the agreements to settle, we were referring to Rule 11 agreements. And my understanding is that the Rule 11 agreement with Pittsburgh-Corning, which I believe ended up being an agreed judgment, was not entered into until sometime later. So those are two different issues.

Q. Oh, I see.

A. But I believe—

MR. LYNCH: Go ahead and finish your answer.

Q. (BY MR. GREENBERG) Please finish your answer.

A. That's all right Go ahead. I mean, I just think they're—

Q. I'm through with the question.

A. Okay.

Q. Okay. Well, is—is it your opinion as an [114] expert in this case that when a law firm does not follow its own practices, it's negligent?

A. Not per se.

Q. What does that mean?

A. I mean, not in every instance. Sometimes you have to go around your normal procedures because the case is different.

Q. Well—

A. You have to address each case individually.

Q. —I guess what I'm interested in is, is a law firm's prior action, is that the standard for negligence?

A. No. It is some evidence of knowledge, ability, and a way of—a process of doing things. It's not, per se, negligence.

Q. Well, let's see. Can a law firm fail to follow its historic procedures and not be negligent?

A. Of course.

Q. Can a law firm follow its historic procedures and be negligent?

A. Of course.

Q. Okay, Now, I believe that you understand from the facts that all of the Plaintiffs in this case agreed to settle for 2.4 approximately, but that the results of that agreement, they only got 2.1 or something like that?

A. Some number. Some number less, yes.

[115] Q. Okay. Do you fault Baron & Budd for that?

A. Do I fault them for that? Yes. I guess the answer to your question would be yes.

Q. Okay. And in what respect?

A. Well, as it relates to—

Q. May I—may I withdraw the question, so that I can be more specific?

If there were settlements of 2.4 to which the Plaintiffs agreed, and subsequent to those agreements and settlements there were receipts of 2.1, leaving approximately $300,000 not paid—that's your understanding of the facts, correct?

A. Correct.

Q. Okay. Now, assuming that's correct, what fault do you attribute that deficiency to Baron & Budd?

A. As it relates to Manville, I believe the letter that was sent to Karin Jacobs certainly should have been sent to all Plaintiffs.

As it relates—and I don't know—and I don't know the answer to this because when I spoke with Ms.

Jacobs, it was clear to me she was not aware of the effect of the Manville settlement She didn't really understand it, Now, I don't know if she called and asked to have any additional information. If she didn't, I don't expect that the lawyer would have sent her anything [116] else.

As to Pittsburgh-Coming, Fibreboard, Eagle-Picher, and Rapid American, I believe, is the other one, if Baron & Budd was aware, which I'm sure they were, of the financial problems with those corporations, I believe that those settlements should have been earlier and they should have been consummated prior to settling with the other defendants who had—who were more solvent, And I believe that they should have enforced the Rule 11 agreements that were entered into.

Q. Once again, you—you agree with me, that plaintiffs nor plaintiffs' lawyers can force defendants nor defendants' lawyers from complying with agreements they make short of filing suit, getting execution, or seeking recourse in bankruptcy?

A. There are—there are hoops you have to jump through to enforce those agreements. No doubt about it.

Q. Those are the hoops?

A. Those are the most likely hoops, yes.

Q. Yeah. Do you know of any—of any other methods that could be used to make a defendant or defendant's lawyer comply with a prior agreement other than what we talked about?

A. Well, the economic issue. I mean, that's the first and best one they always use.

[117] Q. Now, the Plaintiffs, but for—well, strike that.

Did you know, because I don't see it anywhere in your files, that all of the Plaintiffs in this case agreed to accept all of the money they received in the Jacobs case by signing written agreements?

A. Yes, I was aware of that.

Q. And you have no problem that they received all of the money that they signed releases for.

A. I don't even understand the question.

Q. Well, I don't see any checks in your file. I don't see any releases in your file.

A. I have reviewed the releases. That was in that box. I have—I have reviewed those releases, or some of them anyway. I don't—I sure haven't reviewed—I'm sure I didn't review thirty of them, but I reviewed some of them.

Q. Well, you're familiar, are you not, that all of the Plaintiffs—none of the Plaintiffs were required to sign releases?

A. I think they're irrelevant.

Q. What?

A. I think they're irrelevant.

Q. The releases are irrelevant?

A. As far as the Plaintiffs go, yes.

[118] Q. Is the money given to the Plaintiffs irrelevant?

A. No, no, no, no. I mean, I think the settlement had been consummated prior to those releases being signed.

Q. Well, wait a minute. If—if the defendants are relieved from complying with agreements, why can't plaintiffs be relieved from complying with agreements?

A. Well, I haven't testified that defendants are relieved from being—from complying with agreements. In fact, my position is that they should have been required to comply with the agreements.

Q. But you've testified that the only way that you can enforce it is by execution, lawsuit, or filing in bankruptcy courts.

A. Yeah. But in a—in the case of a—of a release, what you do is you plead release, file a motion for summary judgment in that case, and it's ruled on I mean. . .

Q. Well, is it your testimony that the releases that the Plaintiffs signed in this case are of no moment?

A. No moment as to the settlement of the Plaintiff's, not—I mean, they were of moment for the defendants. I mean, I think the defendants want that for their file. I would if I represented a defendant.

[119] However, once the Rule 11 agreement was signed—and it's my understanding that the agreement between Baron & Budd was—and the Plaintiffs was that Baron & Budd had the authority to settle those cases—I think they were, in effect, settled.

Q. Did you read any of the transmittal letters from Baron & Budd to the Plaintiffs transmitting settlement agreements that said, now, you don't have to sign this if you don't want to?

A. No, I didn't read that. Of course not.

Q. Well, do you know that as a matter of fact, that some language to that effect in some of the settlement agreements sent them contained that language?

A. No, I don't know that.

Q. Okay. Well, let's just assume that. Now, does that change your opinion at all?

A. That they had to sign it?

Q. No.

A. That they didn't have to sign it?

Q. That they had a choice.

A. No. They obviously had a choice of whether or not to sign the agreement. I agree with that.

Q. Well, they didn't have to sign the agreement, right?

A. Correct.

[120] Q. And if they were told if they were unhappy, not to sign the agreement, and they were truly unhappy, didn't want the money, thought they ought to get more, they could have just not signed the agreement, right?

A. They could have not signed the agreement, yes.

Q. And that would have the following effect, correct? One, they wouldn't have gotten the settlement proceeds, correct?

A. Well, I don't know.

Q. That's because you didn't read any of the transmittal letters?

A. No, sir. That's because the rule under the agreement—it depends upon Baron & Budd's position because the Rule 11 agreements, when you give an agent authority to contract on your behalf, and he or she does that, you are bound by that contract. They gave Baron & Budd the authority to contract on their behalf. Baron & Budd did that. And I think the Plaintiffs were bound. And Baron & Budd could have said, well, the case is settled, or the defendants could have said the case is settled. I don't know what the effect would have been.

Q. So then it was improper and wrong for then Baron & Budd to send releases to the Plaintiffs and give them a choice as to whether they signed them or not signed them?

[121] A. No that wasn't wrong.

Q. Well, if you have handled asbestos cases, give me an instance where an asbestos defendant pays money to a plaintiff without a signed release from that plaintiff.

A. You always get—I always got releases. And. I'm not aware of a defendant who did not want a release from the plaintiff to settle a case.

Q. Okay. But I'm not talking about desires and wishes and wants. I'm talking about can you tell me of an instance in your vast asbestos experience where a defendant has paid a plaintiff without a release?

A. I'm not aware of that.

Q. Okay. So if the Plaintiff in this case—the Plaintiffs in this case, or one of them, refused or didn't—didn't want to sign a release, Baron & Budd gave them that choice every time they sent them one?

A. Okay. I'm sorry. I didn't understand your question.

Q. Do you know whether or not in this ease, when funds were received and payments made and releases sent to the Jacobs Plaintiffs, they received letters from Baron & Budd in some instances saying if you're not happy with this, don't sign the release?

A. No. I'm aware of that happening.

Q. And is that proper or improper?

[122] A. Proper.

Q. Now, once the Plaintiffs—the Jacobs Plaintiffs sign the release, does that form an obligation on their part?

A. They released the claim.

Q. All right. Does it does it give them any rights?

A. Rights to receive the moneys pursuant to the agreement.

MR. GREENBERG: Okay. If you'll give me one more break, I may be close to being through.

THE WITNESS: All right.

THE VIDEOGRAPHER: Off the record at 11:37.

(Recess taken)

THE VIDEOGRAPHER Back on the record at 11:44.

Q. (BY MR. GREENBERG) Looking back at the February 7th, 2000 letter, we talked a minute right before the break that the disagreement here boiled down to 2.4 versus 2.1 generally.

A. Okay.

Q. But that's really not accurate, is it?

A. I don't 'know. Tell me. What do you mean?

Q. Well, I kind of reread the February 7th letter.

[123] A. Okay.

Q. And the way I read this letter is that on page 2 of the letter, with three asterisks, it says, "Please note that payment of decedent's Johns-Manville note is uncertain and it may be that the recovery on the decedent's claim does not exceed the cash payment already received."

Do you see where it says that?

A. Yes, sir.

Q. So if that turns out to be true, you'd have to subtract another $180,000 from the 2.4, wouldn't you?

A. I guess you could. I understand your argument.

Q. It's not an argument. If I know that I'm probably not going to get that, then I can't rightfully expect to get it, can I?

A. That's a correct statement.

Q. Okay. And the Plaintiffs in this case were informed that they couldn't rightly expect to get that?

A. On February 7th, 2000, Patria Jacobs was apparently—that's the letter I have—apparently informed of that.

Q. So therefore, the amount that they could reasonably expect to receive would be 2.4, less $180,000?

A. Well, this letter, as it's phrased, was after [124] the settlements had occurred. And so at that point in time, I mean, it's too late, I guess, is my statement. You can't settle a case and then write a letter saying, oh, by the way, you get less than we told you you were going to get and expect that. I don't agree with that statement.

Q. Let me put it to you this way If I tell you on behalf of ABC company, P11 pay you $100,000 And you say okay, I'll take it And we sign a Rule 11 agreement, an agreed judgment, and we even get a brick, and we put it in brick and we both sign it. And then my client goes bankrupt, and I just hand you the brick and I say go collect it. Okay? Assume those are the facts.

So assume you hire a great bankruptcy lawyer, and you go to the bankruptcy court and say, okay, look, I've got all of these agreements—Rule 11, a brick, agreed judgment. Pay me.

And the bankruptcy court says, well, we have a matrix and a trustee and you go to him. That's where you get your money. And you say, well, but it was $200,000 and the trustee says, well, you get five.

What can you do about that?

A. In that circumstance, very little, if anything.

MR. GREENBERG: You've been very kind. I look [125] forward to talking to you again should you discover your other file based on the agreement we

made or should you read something that causes your opinions to change.

CROSS EXAMINATION

BY MR LYNCH:

Q. I have two or three questions. Mr. Hendrix, would you tell us in your discussions—

THE VIDEOGRAPHER: Your microphone.

Q. (BY THE WITNESS) Mr. Hendrix, would you tell us in your discussions and investigation in this matter involving conversations with the Plaintiffs what you were informed with regard to what, if anything, they knew about bankruptcy and which defendants were affected by bankruptcy?

A. I was informed that they were unaware of the effect of the bankruptcy on their settlement and that they thought that they would get the full settlement proceeds.

Q. Was that something you learned from the Plaintiffs as distinguished from their attorney?

A. Yes.

Q. Now, you've been asked about values. In fact, Mr. Greenberg was just asking you about the 2.45, less a certain amount, related to the Manville settlement. I'm going to ask you if we assume that Mr. Tapscott stated [126] that the case had indeed been settled for $2.45 million and perhaps more, that that would have been a reasonable settlement worthy of being accepted as a cash settlement for the entirety of the case?

A. I have no reason—I have no opinion that it's not. I have no reason to believe that it would not have been sufficient.

Q. And if we could take a look at and if you'd hand me the exhibits that Mr. Greenberg showed to you I'd like to hand you—

A. Some of them aren't marked, so it might be one of those.

MR. GREENBERG: Are these the unmarked documents?

THE WITNESS: Yes.

Q. (BY MR. LYNCH) There was a Baron & Budd website page. Is that still here, or is that in your records?

A. No. That was marked. I know he marked it.

Q. It was in your file?

A. He marked the document, I'm pretty sure. It's probably here somewhere. Right here.

Q. Mr. Greenberg asked you about Exhibit Number 9, which is a printout from the Baron & Budd website that I provided a copy to you under the category [127] of Legal Victories. Do you see that?

A. Okay.

Q. And this is a document that you received recently as opposed to at the time that you wrote your report; is that correct?

A. Yes.

Q. And in reviewing this document, can you tell us whether or not a $2.5 million cash settlement would be a reasonable settlement worthy of accepting in cash based upon the Baron & Budd's descriptions of other mesothelioma cases that they've handled and made recoveries on behalf of their clients?

A. Based on the information I have, I can't tell you that ifs not.

Q. Okay. And would it, therefore, be a reasonable settlement?

A. I don't have the information that I would need to say that it's a reasonable settlement. I do not have any information that leads me to believe it was not a reasonable settlement.

MR. LYNCH: All right. Thank you. That's all. We've reserve the remainder of our questions.

MR. GREENBERG: I don't have anything further.

THE VIDEOGRAPHER: Off the record at 11:51.

(Recess taken)

[128] THE VIDEOGRAPHER: Back on the record at 11:52.

RE-DIRECT EXAMINATTON

BY MR GREENBERG:

Q. Am I correct, Mr. Hendrix, that the opinions that you have in this case are the ones that you've articulated here at your deposition, together with those that are contained in your report?

A. Yes.

Q. And you don't have any other opinions?

A. Oh, I have several other opinions.

Q. Dealing with this case?

A. No, not that I've been asked to look at.

Q. Okay. And you're going to let me know if you're asked to get into other fields?

A. Of course. I'd have to update my report.

Q. Okay. So anybody reading your report or reading—in conjunction with your deposition would then know all of the facts upon which you rely and all of the opinions which you have in this case at this point in time?

A. As to the former, not necessarily. As to the latter, I have expressed the opinions that I have. You've asked me that, and I've done that. I can't—I mean, I've answered your questions and that's what I—

* * * *

APPENDIX S

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed May 8, 2008]

No. 07-10558

KARIN JACOBS, PATRIA JACOBS,
AND JOEANN FROST,
Plaintiffs-Appellants,

v.

WILLIAM K. TAPSCOTT, JR.
AND BARON & BUDD, P.C.
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
3:04-CV-1968

Before DAVIS and SOUTHWICK, *Circuit Judges*, and CLARK, *District Judge*.* PER CURIAM:**

Appellants in this case challenge the dismissal of their suit pretrial in an order granting a motion for summary judgment (dismissing some of the claims) and a later judgment as a matter of law (dismissing the remaining claims).

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* District Judge of the Eastern District of Texas, sitting by designation.

** Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

The plaintiffs-appellants are the heirs of Carl Jacobs, who died of mesothelioma as a result of asbestos exposure. The defendants-appellees are attorney William Tapscott, and his then employer, the law firm of Baron & Budd, who represented plaintiffs in their asbestos-related litigation against numerous corporate defendants. Before the June 1999 trial setting of the asbestos litigation, the appellees negotiated settlements with the asbestos defendants for a total of $2.4 to $2.5 million. After the settlement was agreed to, one of the defendants withdrew its offer. Other defendants filed bankruptcy proceedings. As a result, counsel collected only $2.1 million of the settlement sum.

Plaintiffs were dissatisfied with counsels' service, primarily because all of the settlement funds were not collected. Plaintiffs sued their attorneys on theories of negligence, misrepresentation, gross negligence, breach of contract, and breach of fiduciary duty. Specifically plaintiffs alleged that they were not informed of certain settlement details, such as the fact that it would not be paid entirely in cash; because one company, Pittsburgh Corning Corporation ("PCC") had pulled its settlement agreement; because certain other defendants were in poor financial condition or bankrupt; because the attorneys did not obtain written confirmation of settlements and did not protect plaintiffs from the consequences of post-settlement bankruptcy of asbestos defendants; and because they were not notified of renegotiations of settlement amounts.

The district court granted the defendants' Motion for Summary Judgment as to all claims except two breach of fiduciary duty claims. Based on our review of the record and applicable law, we agree with the

district court that summary judgment was appropriate on plaintiffs' claims of negligence, misrepresentation, gross negligence, breach of contract, and breach of fiduciary duty. We agree with the district court that: (1) plaintiffs failed to demonstrate they were damaged from counsels' alleged negligence and misrepresentation; (2) plaintiffs failed to state a claim predicated on gross negligence; and (3) plaintiffs' breach of contract claim was an impermissibly fractured malpractice claim. In addition, apart from the two fiduciary duty claims that survived the motion for summary judgment, plaintiffs' breach of fiduciary duty claims were either impermissibly fractured malpractice claims or were barred because they were not raised in plaintiffs' original complaint. Essentially for the reasons assigned in the district court's thorough September 25, 2006 order, we agree that the court correctly granted summary judgment on the claims covered by that order.

The two remaining prongs of plaintiffs' fiduciary duty claim were heard by a jury. The two remaining claims were:

(1) that defendants had improperly used and exercised the powers of attorney granted to them in the employment agreements with plaintiffs so as to improperly gain the benefit of attorney's fees and avoid the necessity and expense of a jury trial; and

(2) that defendants breached their fiduciary duties by deliberately lying to plaintiffs and telling them that the entire underlying litigation had settled, without telling them that a single defendant, Pittsburgh Corning, had not settled.

The jury rejected the first claim and rendered a verdict in favor of plaintiffs on the second claim, awarding them $129,000. Thereafter on Motion for Judgment as a Matter of Law, the district court dismissed the second claim, rendering judgment for defendants notwithstanding the jury's verdict.

Again based on our review of the record, we agree with the district court that the evidence was legally insufficient to prove that Tapscott deliberately lied to plaintiffs, because there was no proof of when he knew that Pittsburgh Corning had pulled its settlement offer in relation to when he told plaintiffs that their case had settled in full. Any claim that the defendants later concealed the fact or failed to inform them that the settlement with Pittsburgh Corning had been withdrawn did not survive the motion for summary judgment. The narrow fiduciary duty issue that survived the motion for summary judgment was described by the district court in the order disposing of that motion as "an alleged deliberate lie rather than a mere failure to communicate or inform." In addition, the district court properly stated that a claim of failure to communicate is a fractured claim of legal malpractice, which claims were disposed of in the motion for summary judgment. Essentially for the reasons assigned in the district court's thorough April 12, 2007 order, we agree that the court correctly granted judgment as a matter of law on the claim that defendants breached their fiduciary duty by deliberately lying to the plaintiffs. Because plaintiffs' fiduciary duty claims were properly rejected, their attorney fee disgorgement claim was properly denied.

AFFIRMED.

APPENDIX T

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed May 8, 2008]

No. 07-10558
D.C. Docket No. 3:04-CV-1968

KARIN JACOBS; PATRIA JACOBS; JOEANN FROST,
Plaintiffs-Appellants,

v.

WILLIAM K. TAPSCOTT, BARON & BUDD, P.C.
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas, Dallas

Before DAVIS and SOUTHWICK, Circuit Judges, and CLARK, District Judge.*

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

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* District Judge of the Eastern District of Texas, sitting by designation.

ISSUED AS MANDATE: JUN 02, 2008

A True Copy
Attest

Clerk,
U.S. Court of Appeals, Fifth Circuit
By: Shawn D. Henderson
Deputy
New Orleans, Louisiana